CoursePack

for

ELR 641

Contract Administration Negotiating Grievance Settlements

By Don McPherson
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Dennis Frketich
Indiana University of Pennsylvania

NEGOTIATING GRIEVANCE SETTLEMENTS: CASES and MATERIALS

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University Professor
and
Professor of Industrial and Labor Relations
Indiana University of Pennsylvania
Indiana, PA 15707-1087

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ABOUT THE AUTHOR

INTEREST-BASED NEGOTIATION: APPLICATIONS TO GRIEVANCE RESOLUTION

Donald S. McPherson

Professor of Industrial and Labor Relations
Indiana University of Pennsylvania

Many work place studies have demonstrated what anyone involved with labor relations knows intuitively: the grievance procedure is not only an indicator of the quality of the labor-management relationship and an available vehicle for its improvement, but also an important force shaping member commitment to the union. Despite these crucial roles, the grievance procedure is remarkably ineffective in capturing and dealing with a large number of practical, contract-implicating problems. I will argue that many problems associated with traditional grievance procedures can be traced to their focus on taking positions regarding rights established by contract or past practice. We will see that such a focus is understandable given the structure of grievance systems and the legalistic training of the parties for representation of issues in the grievance procedure. What I hope to accomplish in this article is to reveal another way of thinking about grievances - viz., as an opportunity to uncover and deal with more fundamental interests of the parties. It is my position that any mechanism that promotes consideration of underlying interests promises to resolve problems in a manner that offers a firmer foundation for improved overall relationships between the parties.

PROBLEMS WITH TRADITIONAL GRIEVANCE PROCEDURES

Based on their extensive field research, David Lewin and Richard Peterson (1988) estimate that as many as 1.2 million written grievances were filed in 1986, or approximately one grievance per 15 union members in the labor force. They also estimate that the ratio of complaints not resolved in the formal grievance procedure to actual, official grievances is at least 6-1 and perhaps as high as 9-1.

Putting aside both the fate and implications of this enormous volume of "ungrieved" complaints, what happens to the still impressively large volume of

AFL-CIO Department of Economic Research. Work Place Topics, Vol 2 (July, 1992).

official, filed grievances? In their pioneering work on the design of effective dispute resolution systems, William Ury, Jeanne Brett, and Stephen Goldberg (1988) provide a disturbing description of inefficient dispute resolution in a hypothetical, but representative, coal mine. Workers choose to use the prescribed grievance procedure to deal with only 50% of their complaints. When the grievance machinery is utilized, 14 percent of their grievances are settled at some step in the procedure and 10 percent are arbitrated. The union "wins" 2.5 percent of these arbitrations and the employer "wins" 7.5 percent. Of the remaining grievances, 71 percent are withdrawn -- "lumped" -- and 5 percent result in direct job action, in this instance, wildcat strikes. While no claim is made that such patterns are representative of grievance procedures generally, other studies of grievance activity report high levels of grievances neither settled nor arbitrated. The "lumping" of an employee problem important enough to result in an official grievance cannot be considered a "win" for the union. And the lumping of as many as 71 percent of grievances filed raises serious questions about the grievance procedure as a mechanism for administering the collective bargaining agreement.

One must not, of course, ignore or devalue the "voice" function of the grievance procedure or the crucial importance of procedural justice to union members. In an earlier issue of Work Place Topics, Paul F. Clark and Daniel G. Gallagher (1989) reported that union commitment was more closely tied to the procedural justice afforded by the grievance system than to the distributive justice associated with grievance outcomes. Based on their extensive research with the National Association of Letter Carriers, they conclude:

> On average, the members responding to the survey were much more positive about the manner in which the union performed its representation function than they were about the outcome of the grievance procedure in the work place. This may suggest that NALC members understand that the end result of the grievance procedure is not solely the responsibility of the union. (pp. 17-18)

Given the long federal service history that in many ways informs the NALC's contemporary collective bargaining relationship, a particular concern for procedural

justice may be expected from its membership, exemplified by the extensive and detailed due process protections codified in postal service labor agreements. Still, one cannot gainsay Clark and Gallagher's conclusions that the union shapes member commitment by serving its representational function in the grievance procedure and that employees understand that the union is not the sole determinant of grievance outcomes.

Nevertheless, estimates of the volume of unresolved grievances such as those suggested by Ury, Brett, and Goldberg also raise the nagging question of whether some still greater measure of distributive justice (results) for union members might be achieved without sacrificing procedural justice (due process and representation). Michael E. Gordon and Gerald E. Fryxell (1989) suggest that both procedural and distributive justice are important matters affecting the perceptions of union members. When discussing the earlier research on grievances, they state:

> The procedures followed, more so than the outcomes obtained, were likely to influence overall judgments of the grievance system. Clearly, the principles of the system appear to be more significant than the current level of outcomes, although the latter should not be regarded as unimportant. (p. 14, emphasis added)

From the management perspective, too, a real problem left unresolved by a "lumped" grievance is not a "win" except in the narrowest, tactical sense. Though at first blush it may be pleased by union withdrawal of a grievance, management must realize that its "victory" may come at the cost of personal and institutional animus toward the employer. Unless employee, union, and employer interests attached to unresolved problems are somehow addressed, they remain dormant and potentially dangerous to the parties and to the relationship.

One of Peterson and Lewin's (1989) more provocative findings is that grievances have costs (e.g., lower performance evaluations) for the employee and his/her immediate supervisor. Their research reports that both grievants and supervisors against whom grievances are filed became objects of management retribution. "...both the grievants and their supervisors [received] less favorable outcomes the year after the grievance was initiated than the year before or the year

of filing the grievance when compared to a sample of nongrievants and their supervisors" (p.7).

INTEREST-BASED VERSUS RIGHTS-BASED APPROACHES

If grievance representatives are trained to use interest-based, integrative problem-solving skills in addition to the traditional rights-based, adversarial approach, mutual gains are potentially available to employers and unions, and individual gains may be had by employees and supervisors. As Peterson and Lewin (1989) argue:

> Adversary labor relations have costs for both parties that are often not considered. . . There needs to be more commitment to joint gain situations. (p. 8)

Ury, Brett, and Goldberg (1988) distinguish among power, rights, and interests as bases for resolving conflict. Mutual gain approaches to negotiation also distinguish between resolution and settlement of conflict. Disputes are settled either through the exercise of power (e.g., wildcat strikes, work to rule, and other job actions) or by an appeal to a legitimate third party empowered to determine rights (e.g., courts and labor relations boards for public settlements, and arbitrators for private settlement). Disputes are resolved by the parties themselves. "Resolution" as a concept carries both a reflexive connotation of solving (finding an answer to or way out of a problem by oneself) and the musical connotation of change or transformation that converts discord (disagreement; clashing) to concord (agreement; harmony).

Recognizing and dealing with differing interests requires distinguishing interests from issues and positions. A party's position and the interests that underlie it are rarely the same. This important distinction is illustrated incisively in The Manager as Negotiator by David A. Lax and James K. Sebenius (1986):

> Negotiators seek to reach agreement on specific positions on a specific set of issues. For example, a potential employee may initially demand $36,000 (her position) for her salary (the issue). Her underlying interest may be in financial security, enhanced life style, organizational status, and advanced career prospects. Or, recall . . . how the desire of a

> midwestern electric utility company to build a dam collided with farmers' needs for water and environmentalists' concern for the downstream habitat of endangered whooping cranes. Increased economic return, irrigated crops, and preserved species were the relevant interests; the parties conflicted over the issue of the dam's construction, and took positions for and against it. (p. 68)

In Getting to Yes (1981), Roger Fisher and William Ury urge negotiators to distinguish and deal separately with issues related to the substance of their negotiation and issues related to their relationship. Taking this distinction even further, Lax and Sebenius (1986) argue that a more expansive concept of "interests" greatly increases the capacity of parties both to harmonize their interests and to improve the quality of their relationship. They distinguish between process interests (measured by satisfaction with the nature of individual interactions), relationship interests (measured by satisfaction with the overall quality and duration of the relationship and extent of interdependence), and principles interests (measured by satisfaction with the degree of agreement to essential norms or values). Each of these categories of interests also may be seen as having both intrinsic value (value that is independent of subsequent dealings) and instrumental value (value that is increased because of effects on subsequent dealings). The ability of parties to recognize and articulate this great variety of interests and values permits a rich array of potential exchanges. Such exchanges may entail simple or complex trades, or contingency agreements that account for differing values on risk aversion, probability calculation, and time preference.

In addition to an expansive concept of interests, negotiators must have a clear view of their practical alternatives to agreeing. Fisher and Ury (1981) coined the acronym BATNA (Best Alternative To a Negotiated Agreement) to focus attention on the power-creating capacity of knowing one's "bottom line" and attempting to discern the "bottom line" of the other party. Only by recognizing and constantly evaluating alternatives to agreement can a negotiator know whether a given possible resolution maximizes the satisfaction of interests. According to Lax and Sebenius (1986), the ability to expand one's no-agreement alternatives, the ability to change the other

party's perception of one's own no-agreement alternatives, and the ability to influence the other party's calculation of its own no-agreement alternatives are all associated with notions of "bargaining power."

At the heart of rights-based dispute settlement is the availability of a third-party mechanism for choosing between the differing positions of the disputing parties if they are unable to compromise. Third parties interpret and apply the law, regulations, or contract to determine the relative legality of the positions. By contrast, at the heart of dispute resolution is collaboration (working together, side-by-side) between the disputing parties in problem-solving to discover and deal with their differing interests. The parties attempt to re-frame the conflict from one rooted in differing rights (positions) to one rooted in differing interests, and then try to bring the interests into harmony.

As a paradigm or mindset for dealing with conflict, resolution promotes both individual and joint empowerment and responsibility by requiring mutual action by the disputing parties themselves rather than a binding decision by a third party. Since the parties must take risks to reveal their interests, conflict resolution through successful collaboration has the power to build trust and increase the parties' mutual capacity for solving problems, thereby setting the stage to transform their long-term relationship. Interest-based approaches to negotiation skill-building focus on strategies and tactics that can create and claim common value and, thus, enhance "working relationships" that enable the parties to deal effectively with differences (Fisher and Brown, 1988.) In unionized settings, any attempt to promote a more collaborative relationship needs more efficiently to "capture" work place problems that potentially implicate the contract and to resolve them within the grievance procedure.

Some unionists have responded scornfully toward so-called "win-win" approaches, seeing them as "wimpy" because they unrealistically assume a trusting relationship and good will, leaving the union vulnerable to opportunistic gain if management decides to pursue its own interests at the expense of the relationship. But choosing an interest-based approach on any given grievance requires no

abandonment of the more traditional, rights-based adversarial arena. Interest-based grievance negotiation has greater utility than rights-based settlement only in those situations where each party can sufficiently satisfy its own interests and also achieve a portion of available joint gains; i.e., where both parties can get "more" if they collaborate by harmonizing interests than if they either simply compromise their positions or leave the power of choice between their positions to a third party.

THE GRIEVANCE PROCEDURE AS NEGOTIATION

Ironically, the rich store of ideas that have become standard fare in the interest-based language of conflict resolution is still largely foreign to the rights-based language of contract administration. Vast experience as a mechanism for negotiating dispute settlements still has not sensitized many grievance committee persons and their management counterparts to interest-based concepts such as focusing on interests rather than positions; identifying, articulating, evaluating and altering perceptions of no-agreement alternatives; using problem-solving techniques to create value and invent options for mutual gain; and constructing more efficient "second-agreement agreements."

Grievance settlements are considered "adjustments" under the law, and unions seeking information necessary to process grievances or to evaluate potential grievances are entitled to secure it because of statutory good-faith bargaining mandates. Since 1935, private-sector labor law has defined the collective bargaining required of employers and representatives of employees:

> to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, [emphasis added] and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession [Labor Management Relations Act, 1947, As Amended, Sec. 8(d)]

Thus, the negotiation of grievance settlements where possible (leaving to arbitration or unilateral withdrawal only those cases that cannot be settled by

bargaining) is the objective of the grievance procedure sanctioned by statute. There is abundant support provided by both law and past practice for the notion of the grievance procedure as a vehicle for negotiation.

But the "modern" grievance procedure has come to be viewed as an essentially adversarial, predominantly rights-oriented mechanism. Indeed, the conventional wisdom has been that preserving the grievance procedure undisturbed for adversarial disputes was necessary before parties could establish other, more open, collaborative working relationships. Stephen Goldberg and William Hobgood (1987) concisely describe this rights-based, distributive, win/lose mindset in their pamphlet on grievance mediation for the U.S. Department of Labor's Bureau of Labor-Management Relations and Cooperative Programs:

> The use of a more collaborative, problem-solving approach in dealing with issues of joint concern in an employee involvement program tends to affect the parties' entire relationship. Styles and skills used in joint cooperation are often transferred to the collective bargaining arena. In this way the cooperative approach begins to impact the entire enterprise.
>
> The movement toward a more cooperative approach to collective bargaining has not always been accompanied by a similarly cooperative approach to the resolution of disputes under the collective bargaining contract. Initially, the resolution of such disputes is customarily excluded from the jurisdiction of the employee involvement program and is committed to the contractual grievance procedure. For, it is thought, regardless of how a contract has been negotiated, once it is signed, each party has certain rights. If the other party will not recognize those rights, the only option is to proceed through the grievance procedure, and, if necessary, to arbitration. (p. 2)

Indeed, the very nature of the contemporary, litigious grievance procedure is antithetical to collaborative paradigms. Despite the fact that the grievance procedure's statutory function is to facilitate the negotiation of contractual disputes, the dynamics naturally set in motion by the typical multi-step procedure militate against the fundamental principles of effective negotiation in interdependent relationships as they have been elucidated in both scholarly and popular literature over the last 30 years. As soon as a grievance leaves the initial, informal stage, the

issue on which it is based and the mutually exclusive positions taken by each party on that issue are typically committed to writing. For the most part, opportunities to consider underlying interests and alternatives to agreement are often, at that early point, already forgone.

Once the grievance is filed, the parties work to refine, expand, and strengthen their contrary positions on the issue(s) in dispute. Union and management representatives hope that an overwhelming accumulation of arguments, or power manipulation, or sheer stubbornness might persuade the other party to withdraw from its position. If that fails, and if the positions cannot somehow be brought into accord by compromise, the union must either withdraw the grievance or demand arbitration. This characteristic behavior may at least partially account for the large volume of unresolved grievances. It also stands in stark contrast to the first commandment of Fisher and Ury (1981): "Don't bargain over positions."

ARBITRATION AS BATNA

With the single and promising exception of accelerating interest in grievance mediation, the parties continue to overlook opportunities to resolve fundamental problems through negotiation of interests despite ever more strident criticism leveled at the traditional grievance-arbitration system for its growing formality, delay, and expense. According to the Federal Mediation and Conciliation Service (1991), the total average elapsed time from grievance filing to receipt of an arbitrator's award was 326.6 days in fiscal year 1990, of which 261.7 days (80%) were consumed between the grievance filing and the arbitration hearing date. The average total elapsed time from grievance to award of almost 11 months in 1990 was more than 50 days less than the six-year high of 370.3 days in 1985, but it was also 46 days more than the six-year low of 280 days in 1988.

Representatives of both parties, but especially unions, have loudly denounced perceived trends toward legalism, formality, expense, and delay that make arbitration less acceptable to the parties and place even greater stress on grievance procedures and, thereby, on labor-management relationships. Distressed grievance procedures

become clogged because they are used as tools for opportunistic gain or as vehicles for harassment or political manipulation. A stressed grievance process either results from a failed, ineffective labor-management relationship or produces such a relationship. The precise cause and effect allocation remains a chicken-egg paradox, but the practical problem is a poisoned, downward-spiraling relationship.

Moreover, the tactical use of arbitration by either party -- e.g., forcing each dispute to the arbitration stage to discern how "serious" the other side is before genuinely considering settlement alternatives -- also breeds fundamental mistrust and damages working relationships. Labor arbitrators see this development through their cancellation rates, and many report that it is particularly apparent in FMCS appointments, probably because the services of the agency are without cost. In response, a growing number of arbitrators charge cancellation fees as a standard practice, both to facilitate the management of their calendars and to create a disincentive to abuse the arbitration process. And even without intentional stresses being placed on the relationship through the opportunistic misuse of the grievance-arbitration procedure, the frustration experienced by a party that simply can't afford to arbitrate all meritorious grievances is also highly destructive of working relationships.

Training programs for both union and management officials are largely oriented toward rights-based, adversarial grievance processing: how to gather evidence to support a firm contractual position in preparation for "winning" the case in arbitration. In a recent research project, leaders of two dozen Southern union locals were asked to describe their day-to-day grievance procedures. Judith L. Catlett and Edwin L. Brown (1990) report that the local officers surveyed request steward training classes that are, in reality, pre-arbitration classes. "Stewards are not taught to negotiate grievances so much as to investigate cases that might end up in arbitration" (pp. 64-65). Catlett and Brown describe stewards trained "to forge strong links in the chain of evidence" for arbitration cases but untrained in grievance negotiation skills:

> Our interviews gave us a glimpse into the workings of over two dozen grievance procedures -- all unique, but sharing common problems. The degree of formality in these procedures was noteworthy. Providing employees a "voice" through the grievance procedure is no easy task. It is more than providing the worker a hearing; the grievance handlers in these locals introduced written evidence and laid out detailed arguments, often without feedback from management. The grievance meetings described by many respondents were a far cry from the informal problem solving which one expects to find on the shop floor. The challenge for local leaders and labor educators alike may be to provide the investigative and analytic skills necessary to settle grievances in this formal structure. (p. 65)

By focusing so heavily in training on a rights-based, adversarial conception of the grievance procedure, parties fail to see their own interests, fail to discover the interests of the other party, and fail to evaluate accurately their no-agreement alternatives. Potential settlements fostering their own interests as well as mutual-relationship interests often go unrecognized and unarticulated. And a party that is unable to evaluate whether arbitration is its own BATNA (let alone influence the perception of its BATNA by the other party or change the other party's calculation of the utility of arbitration as its BATNA) is not only negotiating "blind" in the grievance procedure but also lurching unwittingly toward a rude surprise at arbitration.

All too often adversarial grievance training has prepared grievance representatives only with the capacity "to forge strong links in the chain of evidence." Even high-level grievance representatives too frequently are not trained to have the advocacy skills essential to success when presenting cases at arbitration: the capacity to construct a contract-based, persuasive theory of the case, without which all the amassed evidence leads only to a remonstration, rich in "voice," but poor in the power to convince on the merits. Such remonstration is unlikely to change the other party's position about the grievance and renders the representative unable to evaluate no-agreement alternatives -- that is, leaves the representative without "bargaining power."

JOINT GAINS OBSCURED BY RIGHTS-BASED THINKING

The power of a rights-based mindset to block conceptualization of potential mutual-gains solutions can be illustrated with two cases I have regularly used over the past 10 years both in graduate courses and in single-party and joint-grievance training.

The Bulletin Board: A Case of Contract Rights?

A private sector company is experiencing a severe theft problem. In its zeal to solve the problem, it posts a notice stating that it will be calling employees in for questioning and anyone who refuses to respond will be disciplined.

The union, upset at this Draconian approach and concerned about informing employees of their rights to be represented in disciplinary interviews, posts a notice on the union bulletin board decrying the company's announced plans as "gross and unwarranted intimidation," asserting the position that "discipline for refusal to answer questions would not be for just cause," and advising employees "not to participate without first demanding union representation." Company officials, enraged by this confrontational notice, tear it down.

> The contract provides that the employer will supply a union bulletin board "for the announcement of meetings, election of officers, and any other material related to Union business but the Union shall not post material detrimental to the labor-management relationship nor of a political or controversial nature."

Regardless of prior training in grievance processing, and notwithstanding on-the-job experience, few role-players exposed to this scenario make the effort to construct a comprehensive "theory of the case" that attacks or defends the contractual legitimacy of the union's notice as "union business." Answering this question will be at the very heart of an arbitrator's interpretation of the contract. Each party must determine whether arbitration really is its "Best Alternative To a Negotiated Agreement" (BATNA) or it proceeds blindly in the grievance procedure. Arbitration cannot possibly be evaluated as an alternative to settlement without a rigorous, dispassionate assessment of the prospects for "winning" on the merits.

In order to make this important judgement, each party must construct an audience-centered theory of the case. Using logically "provable" factual propositions grounded in the contract, an audience-centered theory is designed to persuade (use reasoning to convince) the other party or, failing that, an arbitrator, of the greater validity of its interpretation. The object of this exercise in persuasion is to convince the other party, or an arbitrator, that no other conclusion is possible. Yet, at most, some union role-players simply remonstrate (declare their feelings in a demand or protest) that "clearly" or "obviously" the union's notice constitutes "union business" and make no further argumentative effort to demonstrate (show or point out clearly; prove; make evident through specimens and examples) that crucial factual proposition.

Some union role-players become totally self-defeated, and some management role-players totally self-inflated, based on the contract's "detrimental" and "controversial" provisions. Role-players simply assume that the meanings of these key clauses are obvious and require no argumentation. Perceiving a weakness, union role-players may assert with great animation and volume that the union's notice was NOT detrimental. And management role-players are likely to respond by asserting with even greater animation and volume that it OBVIOUSLY was detrimental.

Occasionally, someone consults a dictionary for a definition to support an argument. Rarely will anyone address the meaning of the contract's words in the particular fact circumstances of this case. For example, the provocative nature of management's declared intent, and the nature of the union's legal right and obligation to protect member interests, seldom are articulated as context for interpreting "deterimental" and "controversial." Further, the context of the existing labor-management relationship as reflected in the wording of the notices and the unilateral actions taken without consultation rarely is considered in relation to the meaning of the collective bargaining agreement.

Then, too, management role-players will assert that since there is obviously a controversy about the union's notice, it must be "controversial." Only infrequently does a union role-player respond with a contract-based argument; for example, the

argument that "controversial" cannot simply mean that management unilaterally disagrees, for then the agreement's guarantee would be empty. Almost always, management role-players conclude that since they reacted negatively to the union's notice, it was obviously "detrimental" to the relationship as well as "controversial," thus making the case a rock-solid winner for the employer. Frequently they will flaunt this conclusion with great confidence and openly challenge the union to arbitrate.

Few role-players construct arguments probing the outer boundaries of the union's legitimate right to represent employees and the employer's legitimate right to control the work force and act against theft. Only these role-players deal with the crux of the case on the contractual merits: exactly what language in the union's notice, if any, was sufficiently excessive to place it in the realm of the controversial or detrimental, given the language of management's notice and the employer's announced intentions? Unless attention is deliberately turned to these interpretive issues, role-players simply take up their positions on bulletin board notices, rush to find support, and prepare to fight to the death in arbitration, frequently elevating the stakes in their rhetoric to matters of highest principle: the valiant defense of fundamental union and management rights. Role-players rarely demonstrate any ease or expertise in manipulating the "stuff" of persuasion, even though persuasion (as opposed to speaking faster, louder, incessantly, or emotionally) is their primary task.

Even experienced grievance representatives are frequently unable to discern that at arbitration the relative merits of this case are quite close and that in the end the value system of the arbitrator, as influenced by the persuasiveness of the parties' arguments, may be the deciding factor. Instead, both union and management role-players approach the prospect of arbitration confident that it -- or the sheer threat of it -- is their BATNA and that they can "win" the case. Remarkably, however, they generally are able neither to articulate what sort of argument it will take to win nor to evaluate the persuasiveness of the arguments they have prepared.

What if grievance representatives were able to evaluate arbitration as a no-agreement alternative and were also equipped to explore and negotiate the

underlying interests? Under such circumstances, union and management representatives would recognize that the "Bulletin Board" is a dispute over contractual rights that neither party sought and neither party needs. They would be far better off to leave this question in the "never-never land" of ambiguity where it slept undisturbed until the posting of these provocative notices with their unfortunately emotional and all-too-real responses.

Instead, they would focus on the interests of the parties. For example, the employer has a significant theft problem and wants to get at it. The union, while certainly wanting to afford bargaining unit members their legal and contractual rights, has no stake in protecting thieves or obstructing legitimate investigatory efforts. Perhaps if the employer and union could discover and articulate their respective interests underlying the theft issue, they could formulate a mutually acceptable statement of the problem and see their situation as one in which each might make appropriate contributions while still protecting its rights. Importantly, perhaps they could agree <u>not</u> to determine now, through arbitration, the scope of the contractual right to post notices on the union bulletin board. Otherwise, each party exposes itself to a possible loss of substantive contract rights that need not have been risked. In short, at the least, there is a potential settlement range ripe for exploration, but it will be perceived only if the parties suspend the natural impulse to push forward their positions.

Besides, during the 11 months that will elapse before an arbitrator's award is received (assuming this is an "average" case), how is the theft problem at this company going to be addressed? Who will be interviewed? Will management discipline employees for failure to respond to questions? Will stewards be present in the interviews? Will each of those cases also proceed to arbitration on a "just cause" basis? Will the union file unfair practice charges to add greater pressure? Will the parties then also get a determination of <u>legal</u> rights from a labor board deferral to the arbitrator's award? And, when the decision is finally received, what dicta about management or union rights, or what characterizations of the parties' motives, might

jump out from the arbitrator's opinion to provoke new, unforeseen disputes or to exacerbate existing tensions?

Asking interest-probing questions like these is precisely what a grievance mediator does -- raising and maintaining doubts in the minds of the parties as to the utility and tenability of their positions. The flexibility created by these newly raised doubts is then used to permit reframing the contract (rights) issue as a problem of conflicting interests in which mutual gains are possible. For many grievances not resolved in the grievance procedure, whether ultimately "lumped" or slated for arbitration, the parties have not focused on their objectives of winning and losing (interests), nor have they seriously evaluated the chances of winning at arbitration (i.e., their BATNA) on the contractual merits. This is a primary reason for the spectacularly successful resolution rate -- frequently in the range of 80% -- of recent grievance mediation projects and experiments.

Perceiving the interests underlying the "Bulletin Board" grievance as negotiable and engaging in interest-based analysis should permit the parties to conclude that an arbitral determination of bulletin board rights is not their best no-agreement alternative. Indeed, arbitration is no alternative at all for resolving the problem at the root of the dispute.

Interest-based negotiation is not limited to contract interpretation questions. It can also be a powerful tool for the resolution of disciplinary disputes.

"PILING ON": A CASE OF INSUBORDINATION?

The grievant, a loader/operator, uses a mechanical hoist to stack large cartons containing assembled metal desks on wooden pallets for shipping. The warehouse, shipping floor, and the loading dock are becoming very crowded as the result of unusually large, rush furniture orders. Workers have begun sniping at workers on the preceding shift for leaving them too much work.

> Warehouse employees have been working overtime to ship the orders and some approved vacation requests have been rescinded. Supervisors have pushed hard and tempers have flared. At one point, employees became very deliberate about taking every minute of their lunch hours

and scheduled breaks and questioned the accuracy of every detail of shippingorders and invoices.

About 5:00 A.M. on the 11-7 shift, the supervisor instructed the grievant to start stacking desk cartons seven layers high on pallets in order to get more room for the tow-motors to operate on the shipping floor. Pallets are usually stacked four or five high and occasionally have been stacked six high. The grievant responded that it would "put too much stress on the hoist to carry a load that high above the floor."

The supervisor insisted that the grievant stack the cartons as instructed. The grievant walked away, saying he wanted to get the zone steward. When she appeared several minutes later, the steward, who also serves as co-chair of the joint union-management safety committee, said she thought stacking the pallets seven high would create a "safety problem."

The supervisor, visibly angered, instructs the grievant with a firm voice, in the presence of the steward, that he is ordered immediately to begin stacking the pallets seven high exactly as directed and will face severe disciplinary action for insubordination if he refuses this time. The grievant refuses, saying that following the order "would create an unsafe situation." The supervisor thereupon suspends him for the remainder of the shift and the next day.

In this simulation, too, role-players rush enthusiastically to take up positions on the ramparts of battle: did "insubordination" occur and was the suspension for just cause? All the classic issues are present on which management might take positions: Was there a clear and direct order? Was it understood? Were the consequences of disobeying made known? Was the order disobeyed? Was this invocation of "safety" a bald exercise of self-help and soldiering on the job in response to a routine order? And, from the union's perspective, is this an example of a "safety exception" to insubordination? Did the grievant have a sincere belief that following the directive would put him in imminent danger? Would a reasonable person conclude that imminent danger was, in fact, a possibility?

The impulse of the role-players immediately to take up positions on these "rights" questions is almost irresistible. To be sure, the scenario does suggest important questions of rights. In fact, the directness of the employee and steward

challenges to the supervisor's authority for management, and the importance of the safety issue and representational rights for the union, make it exceedingly difficult for the parties even to consider "compromise" of their initial positions. Typically, they become entrenched immediately, remonstrate loudly with each other, and feel impelled to arbitrate.

What of interests in this case? What is the function and status of the joint safety committee in this relationship and how will it be affected by arbitrating this dispute? Will the union also up the ante by filing an OSHA complaint and/or an unfair practice charge? How, as a practical matter, are these sorts of safety claims going to be handled in this work place in the future? How might the status, influence, and effectiveness of the steward and supervisor be compromised by over-zealous cross-examination or poor witness preparation at the arbitration hearing, or by characterizations made by the arbitrator in the opinion? If there is soldiering on the job, will management be better able to get control of it by taking a hard line in this very visible, symbolic case? If the order really is unsafe, how are employees going to be able to protect themselves from improper management directives? Might the parties have a mutual interest in designing joint safety machinery that will work? Would the level of penalty assessed, if not the discipline itself, appear to be a less important issue if <u>that</u> problem could be resolved?

Again, the merits of the case at arbitration may be quite close; the outcome may turn on credibility judgements and might require a site visit to assess the immediacy of the danger -- long after the fact. And, once more, while the parties await the completion of the arbitral process, what will happen in the warehouse, on the shipping floor, and at the loading dock for the next 11 months? Indeed, even with an efficient grievance mediation or expedited arbitration system in place, how will rush orders be handled during the next 6-8 weeks? How can arbitration possibly be the best alternative to resolving the problem giving rise to this grievance, a problem in which the parties have substantial individual and institutional interest investment? Whether they will -- or should -- reach a negotiated settlement is a moot

question unless the parties recognize and explore a settlement range that does exist but may be quite invisible from the vantage of their initial positions.

Neither of these cases belongs in arbitration, but actual cases on which they are loosely based went to arbitration and were decided by awards issued many months after the incidents. In both scenarios, the underlying interests of the parties are remarkably unaffected by the merits of the contract dispute that is arbitrated. And in both, the underlying interests still must be dealt with somehow, apparently outside the grievance-arbitration process, because these familiar yet pressing problems require resolution. With respect to the problems giving rise to these grievances, arbitration of the apparent contract rights questions may be superfluous at best and represent substantial risks at worst.

Obviously, not all problems that give rise to grievances present the possibility for integrative solutions with mutual gains like the cases discussed above. Some disputes involve purely distributive and exceedingly important rights issues that merit taking resolute positions. It is self-evidently in the interest of the parties to arbitrate some grievances. But, it should also be evident that numerous grievances, including many not resolved in the grievance procedure as well as many that have been arbitrated, represent conflicts that may be reframed in a way that can both satisfy individual party interests and realize otherwise forgone joint gains.

The power of interest-based negotiating techniques has long been known to the labor-management relations community. Richard Walton and Robert McKersie's classic 1965 analysis of contract bargaining, A Behavioral Theory of Labor Negotiations, brought wide attention and application of such concepts as utility-based settlement ranges, integrative and distributive bargaining strategies, and attitudinal restructuring tactics. The recent issuance of a silver anniversary second edition of Walton and McKersie's book (1991) in relatively inexpensive paperback format may similarly affect grievance negotiation through application of those same insights to disputes arising under the agreement.

Because the impulse to take a position without much forethought and then proceed to amass support for it is designed into the drivetrain of the contemporary

grievance machinery, it is no wonder that there has been little focus on interest-based approaches in the training of grievance representatives. Maintaining and enhancing "working relationships" would seem to be the self-evident goal of effective grievance procedures. Yet, it is the end-product, "winning" or "losing," rather than the process and relationship dynamics, that for many years has determined the model curriculum of grievance training. As illustrated in the two training cases discussed above, if grievance representatives are not intentionally trained in the "how to" of focusing on interests and evaluating no-agreement alternatives, the normal functioning of the procedure encourages position-taking and predictably inhibits interest-based problem-solving.

Nevertheless, developments on this front are promising. Ury, Brett, and Goldberg (1988) have elucidated and illustrated application of the theoretical principles of designing interest-based dispute resolution systems that can be applied to grievance processing. In addition, a task force in the U.S. Department of Labor's Bureau of Labor-Management Relations and Cooperative Programs is working on the application of interest-based bargaining concepts to grievance processing through intentional dispute systems design and training. Increasing numbers of individual labor and management educators, as well as non-profit agencies such as the American Arbitration Association, are adding interest-based negotiation techniques to their basic grievance process training curricula.

Interest in grievance procedure applications is also accelerating as more successes are reported. Peterson and Lewin (1989) discussed the resurgence of problem-solving in grievance processing and noted recent field research that uncovered several organizations utilizing new, supportive contract language. The National Association of Letter Carriers and the Postal Service are using union-management teams (the "UMPS" program) in a problem-solving approach to grievance settlement. And Donna L. Wilson-Renner and James Eickman (1989) described the success of the Tennessee Valley Authority and its five white-collar labor organizations with interest-based dispute resolution based on a "clinical" (problem-based) rather than a "legalistic" (rights-based) approach.

Incorporating interest-based negotiation as a standard feature of grievance training programs will result in improved advocacy and negotiation skills for use in both collaborative and adversarial settings. Such an eclectic approach fully retains the grievance procedure's voice function and also improves its utility for achieving distributive justice by realizing a share of joint gains that might otherwise be "left on the table." Grievance representatives will be equipped to engage in collaborative, relationship-building efforts whenever such problem solving is possible and advantageous. In addition, stronger, sharper, and more thoroughly developed cases will be appealed when arbitration really is the Best Alternative To a Negotiated Agreement, and that forum will be reserved for those disputes in which it truly is the most appropriate and efficient means of settlement.

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STAGES IN THE GRIEVANCE PROCESS

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(GOAL: Resolution if Possible at Lowest Possible Step)

LOWER LEVELS -- INFORMAL

First Step - Oral

CONFRONTATION: What is the Contractual Issue?

FACTFINDING: What Happened, Who, When, Where?

RECONAISSANCE: What is Their Argument?

How Strongly Do They Feel?

Second Step - Written

DEFINITION: What is the Scope of the Dispute?

INVESTIGATION: What are the Relevant Facts?

CONSULTATION: What is the Viewpoint of Others?

ARGUMENTATION: What is Our/Their Contractual Position?

Third Step - Written

INTROSPECTION: What are Our Interests?

How is the Relationship Affected?

ACTION: Can We Change Their Interest Calculation?

ASSESSMENT: Can We Win at Arbitration?

What Do We Risk Losing?

NEGOTIATION: Is Interest-Based Settlement Posssible?

FINAL STEP - ARBITRATION

PERSUASION: What is Our Theory of the Case?

ADVOCACY: How Do We Prove Our Case?

DETERMINATION: Final and Binding Decision

ASSESSMENT: How Is the Contract Affected:

How Are Those Involved Affected:

How Is the Relationship Affected?

How Are Operations Affected?

How Will Future Bargaining Be Affected?

HIGHER LEVELS -- FORMAL

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THEORY OF THE CASE

I. ADVOCATE'S TASK: TELL AN EFFECTIVE STORY

A. Make Arbitrator <u>want</u> to rule for you.

B. Make it <u>possible</u> for Arbitrator to rule for you.

II. ELEMENTS OF THE STORY

A. <u>THEORY</u>

1. Framework of strategy and preparation

2. Why did Mgt (have) (not have) "Just Cause?"

No notice)
Incomplete investigation) The Seven Tests
Penalty too severe)
Etc.

B. <u>THEME</u>

1. Fits the Theory and "carries" it - a "Mantra"

2. Why did the Grievant do what s/he did?

"Irresponsibility"
"Self defense"
Etc.

III. STRATEGIC ADVANTAGE: THE THEORY OF THE CASE

A. Arbitrator <u>must</u> adopt a Theory to write Opinion.

1. A case grounded in a Theory is stronger than one without a Theory.

2. A case without a Theory is a loss waiting to happen.

B. Characteristics

1. **COMPREHENSIVE** accounts for all the facts

a. Maximizes supportive facts
b. Minimizes harmful facts

2. **COHESIVE** internally logical; "rings true"

3. **CONVINCING** persuasively relates the facts to Contract language

4. **COMPELLING** a theme with moral force

D. S. McPherson

FACTUAL PROPOSITIONS BRIDGE THE GAP:

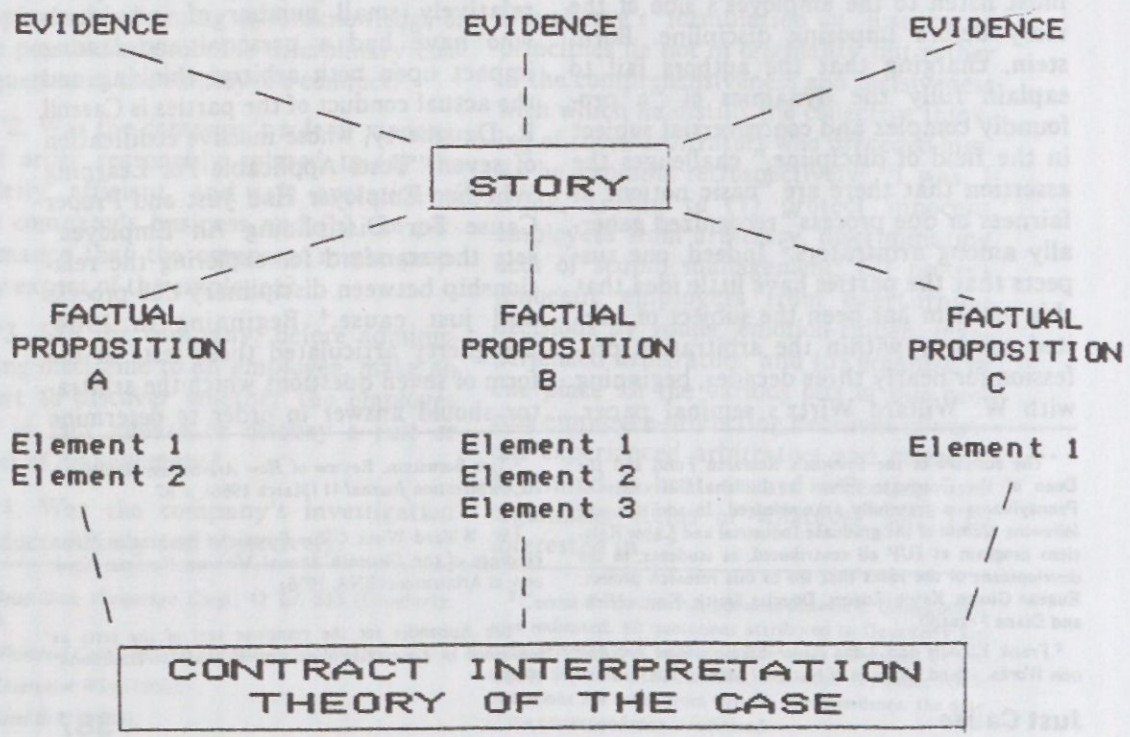
CONTRACT <-- --> FACTS

I. ELEMENTS - Conclusions that can be drawn from Evidence

II. BUNDLES of ELEMENTS - "Just Cause" = "Seven Tests"

1. Just Cause requires adequate advanced notice
2. Adequate advanced notice requires notifying the Employee and the Union of the Rule and its Consequences
3. The Union was not notified; the Rule was unilateral
4. There is no proof that the Grievant received notice
5. The Grievant says s/he did not receive notice
6. The notice that some employees received does not indicate consequences
7. Therefore, the discipline was not for Just Cause

ANATOMY OF A CONVINCING ARGUMENT



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* Adapted from Paul Bergman, Trial Advocacy 2d ed, West: 1989.

July, 1987 Vol. 38, No. 7

The Evolving Concept of Just Cause: Carroll R. Daugherty and the Requirement of Disciplinary Due Process

By Donald S. McPherson*

Professor McPherson teaches Industrial and Labor Relations at Indiana University of Pennsylvania and is an Arbitrator as well.

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The extent to which the just cause standard requires "due process" in the administration of discipline by an employer has been among the knottier problems facing arbitrators in discharge cases. For example, Arbitrator Tim Bornstein criticizes the new fourth edition of *How Arbitration Works*[1] for implying that management must listen to the employee's side of the story before imposing discipline. Bornstein, charging that the authors fail to explain fully the dynamics of "a profoundly complex and controversial subject in the field of discipline," challenges the assertion that there are "basic notions of fairness or due process" recognized generally among arbitrators.[2] Indeed, one suspects that the parties have little idea that this problem has been the subject of spirited colloquy within the arbitration profession for nearly three decades, beginning with W. Willard Wirtz's seminal paper, "Due Process of Arbitration," presented to the eleventh meeting of the National Academy of Arbitrators in 1958.[3]

The evolving idea of just cause, which has been given its fullest expression in labor arbitration, has been influenced by the creative work of many talented and highly regarded arbitrators. Among the relatively small number of individuals who have had a personal and lasting impact upon both arbitral thinking and the actual conduct of the parties is Carroll R. Daugherty, whose incisive codification of seven "Tests Applicable For Learning Whether Employer Had Just and Proper Cause For Disciplining An Employee" sets the standard for exploring the relationship between disciplinary due process and just cause.[4] Beginning in 1964, Daugherty articulated these tests in the form of seven questions which the arbitrator should answer in order to determine

* The support of the Provost's Research Fund and the Dean of the Graduate School at Indiana University of Pennsylvania is gratefully acknowledged. In addition, the following alumni of the graduate Industrial and Labor Relations program at IUP all contributed, as students, to the development of the ideas that led to this research project: Eugene Giotto, Kevin Rogers, Douglas Smith, Keith Allen, and Diane Fegatilli.

[1] Frank Elkouri and Edna Asper Elkouri, *How Arbitration Works*, 4th ed. (Bureau of National Affairs, 1985).

[2] Tim Bornstein, Review of *How Arbitration Works*, 4th ed., *Arbitration Journal* 41 (March 1986), p. 87.

[3] W. Willard Wirtz, "Due Process of Arbitration," *Proceedings of the Eleventh Annual Meeting*, National Academy of Arbitrators (BNA, 1958).

[4] See Appendix for the complete text of the tests as published in *Enterprise Wire Co.*, 46 LA 359 (Daugherty, 1966).

whether the employer had just cause for discipline. Their first expression was in the published case *Grief Bros. Cooperage Corp.*,[5] and he continued to elaborate upon the proper application of the tests in published cases until their final expression in *Whirlpool Corp.*[6]

The Seven Tests

As expressed in his 1966 decision in *Enterprise Wire Co.*, the source from which they are most often quoted, Daugherty states the basic tests as follows. "A 'no' answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such 'no' means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer . . ..

"1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

"2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

"3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

"4. Was the company's investigation conducted fairly and objectively?

"5. At the investigation, did the 'judge' obtain substantial evidence or proof that the employee was guilty as charged?

"6. Has the company applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

"7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?" [7]

Daugherty does not in any way claim original thinking in the formulation of his just cause criteria. To the contrary, he presented his tests from the outset as a compendium of the principles applied by arbitrators over many years. In his view, a "common law" definition of just cause had evolved, which could be applied to the facts of any case with the caveat, however, that frequently "the facts are such that the guidelines cannot be applied with slide-rule precision." [8]

Thus, the significance and creativity of Daugherty's formulation of just cause principles lie not in originality but rather in the comprehensiveness and incisiveness with which he distills the collective thinking of those arbitrators who preceded him. As he explains retrospectively: "I was, I think, trying to (1) protect innocent employees from arbitrary, discriminating acts of stupid management; (2) protect innocent employers from overturning decisions by young, emotion-ridden, inexperienced arbitrators; and (3) organize in one place all the various bits of due process employee-protecting decisions of various experienced arbitrators and referees. My mind is bent toward collecting and organizing items of whatever sort I'm interested in." [9]

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[5] *Grief Bros. Cooperage Corp.*, 42 LA 555 (Daugherty, 1964).

[6] *Whirlpool Corp.*, 58 LA 421 (Daugherty, 1972).

[7] *Enterprise Wire* (1966).

[8] *Grief Bros.* (1964).

[9] Carroll R. Daugherty, personal interview. Unless otherwise indicated, all quotations attributed to Daugherty are from personal and telephone interviews conducted by the author September 20-22, 1985, and April 17, 1986. When quotations are taken from written correspondence, the date of the correspondence is indicated.

References to Daugherty's tests in standard sources on arbitration and discipline abound.[10] Since the late 1960s, the course manual used by the American Arbitration Association in both basic and advanced arbitration courses has included a document titled "Tests Applicable for Learning Whether Employer Had Just and Proper Cause for Disciplining Employee." These tests, published unattributed until recently, are Daugherty's seven questions slightly revised from *Grief Bros.* In the early 1970s, this document actually carried the seal of the AAA Department of Education and Training.

In a more recent version, the AAA *Grievance Processing Manual* includes Daugherty's tests, unattributed, as the entire contents of the section entitled "How to Determine Just Cause."[11] How many persons have been exposed to the tests through this vehicle, probably believing them to be the official pronouncement of AAA standards, is anyone's guess; the audience includes not only those attending such training conferences over more than 15 years but also all those to whom participants have thereafter distributed the document. The extent of distribution, copyright restrictions notwithstanding, is impossible to gauge, but there is no question that the tests have been very widely disseminated. Anyone familiar with the handouts typically provided in employer, union, and academic training programs will recognize the tests.

Indeed, the panoply of reference works on arbitration generally present Daugherty's seven tests as standard treatment of the concept of just cause, sometimes as the conceptual archetype, and frequently quote them verbatim.[12] *Enterprise Wire* is one of 17 awards "written by a few of the many acceptable arbitrators who have shaped the law of arbitration" that are included as examples of "[c]larity of expression, a sense of balanced judgment, and persuasive and fair-minded conclusions" by Cristopher Barreca, Anne Miller, and Max Zimny in their *Labor Arbitrator Development: A Handbook.*[13]

Perhaps the most convincing evidence of Daugherty's pervasive presence in the reference literature is the multi-volume work on discipline and discharge recently initiated by Arbitrator Adolph Koven and his associate, Susan L. Smith. Koven and Smith use Daugherty's tests as the model for analyzing just cause questions in all discipline issues. They have already produced the first two volumes of their series: *Just Cause: The Seven Tests* (1985) and *Alcohol-Related Misconduct* (1984).[14] These volumes will be followed by others and are supplemented by comprehensive coursebooks and a new training film entitled "Arbitration: The Seven Tests of Just

[10] See, as examples, Julius G. Getman, "Labor Arbitration and Dispute Resolution," *Yale Law Journal*, 88 (1979), p. 921; Raymond L. Hogler, "Employee Discipline and Due Process Rights: Is There an Appropriate Remedy," LABOR LAW JOURNAL, Vol. 33, No. 12 (December 1982), pp. 786-787; and "Industrial Due Process and Judicial Review of Arbitration Awards," LABOR LAW JOURNAL, Vol. 31, No. 9 (September 1980), p. 570.

[11] American Arbitration Association, Department of Education and Training, *Grievance Processing Manual* (New York: photocopied, n.d.), pp. 99-102. The history of the use of the tests by AAA was investigated by Lynn L. Brown, Director of Training, and reported in a telephone interview with the author on September 21, 1984. Following further correspondence with Brown in March, 1986, she indicated by letter of April 1, 1986, that AAA training manuals will henceforward use the text of the seven tests as published in *Enterprise Wire* and will cite Daugherty as author.

[12] See Elkouri, *How Arbitration Works*, 3rd ed. (BNA, 1973), p. 627; *How Arbitration Works*, 4th ed., p. 666; Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts* (1968), p. 17:45-47; Harold S. Roberts, *Roberts' Dictionary of Industrial Relations*, rev. ed. (BNA, 1971), p. 241; BNA Editorial Staff, *Grievance Guide*, 6th ed. (1982), p. 1; Owen Fairweather, *Practice and Procedure in Labor Arbitration*, 2nd ed. (BNA, 1983), pp. 244-246; James R. Redeker, *Discipline: Policies and Procedures* (BNA, 1983), pp. 10-18; Marvin Hill, Jr. and Anthony V. Sinicropi, *Remedies in Arbitration* (BNA, 1981), pp. 282-286.

[13] Christopher A. Barreca, Anne Harmon Miller, and Max Zimny, *Labor Arbitrator Development: A Handbook* (Washington, D.C.: American Bar Association/BNA, 1983), pp. 408-418.

[14] Adolph M. Koven and Susan L. Smith, *Just Cause: The Seven Tests* (San Francisco: Kendall/Hunt, 1985) and *Alcohol-Related Misconduct* (1984).

Cause," billed in its advanced publicity as "a film sequel to the classic training film 'Arbitration: The Truth of the Matter,' " which is very widely used.[15]

Clearly, Daugherty did not labor without recognition. In more than two decades since *Grief Bros.*, he has been portrayed in virtually every standard reference as a major, if not the foremost, expositor of just cause. But until one becomes fully aware of the totality of this recognition in the major sources, it is difficult to appreciate the pervasiveness of Daugherty's influence, particularly since the seven tests are often not attributed personally to him in their widespread popular use. No advocate making even a cursory effort to research the meaning of just cause could miss the seven tests, nor could any instructor searching for teaching materials. An arbitrator who wished to apply a recognized set of just cause principles to the facts of a given case could find no more comprehensive, incisive, or widely available interpretation of the meaning of just cause. Even a cursory review of published awards confirms the frequency of their use, albeit often without mention of the source.

Disciplinary Due Process

As the idea of just cause has been elaborated in arbitration over the years, it has come to include, by broad consensus, first the notion of "reasonable rules, reasonably enforced" and second the notion of "progressive or corrective discipline." The notion of disciplinary due process as a component is chronologically the most recent amplification; while still controversial, it is widely accepted. It is the central and most original component of Daugherty's seven tests. Since he does not weight the individual tests, those addressing due process are as important as any of the others as possible grounds for mitigating or overturning a penalty. Thus, through the pervasive impact of the seven tests on the literature of arbitration, Daugherty has had a major influence on the extent to which disciplinary due process has gained recognition and acceptance as a just cause requirement.

Once it was the conventional wisdom that the grievance-arbitration procedure itself provided due process for the accused employee. It was the grievance procedure that guaranteed the complaint would be fully and fairly investigated, that the employee would have an opportunity to learn what he was charged with and to respond, and that the evidence of guilt was substantial. Ultimately, the employee could get his "day in court" in arbitration. But Daugherty explicitly rejects this view, requiring that the tests "are to be applied to the employer's conduct in making his disciplinary decision *before* [emphasis added] same has been processed through the grievance procedure to arbitration. Any question as to whether the employer has properly fulfilled the contractual requirements of said procedure is entirely separate from the question of whether he has fulfilled the 'common law' requirements of just cause before the discipline was 'grieved.' " [16]

In his questions and their accompanying elaborative notes, Daugherty specifies the dimensions of the "common law" due process requirements of just cause. Test 3 requires the employer to attempt to discover whether the employee in fact disobeyed a rule or order *before* making a disciplinary decision. In his notes, Daugherty explains that the employee has the right to reasonably precise notice of the charged offense and to an opportunity to defend himself and that the employer's inquiry must include investigating possible justification for the employee's alleged violation.

Test 4 requires that this *pre-disciplinary* investigation be conducted fairly

[15] Coloracre Publications, Inc., "Announcing A New Series on Discipline and Discharge," advertising brochure (San Francisco, Ca: 1985).

[16] *Enterprise Wire* (1966).

and objectively. The notes specify that the management official may be both "prosecutor" and "judge" but may not also be a witness against the employee. Further, some higher management official must consciously perform a "judicial" role, questioning all individuals, including management officials, rigorously and thoroughly.

Test 5 requires the management "judge" to obtain substantial evidence or proof of guilt *before* deciding upon discipline. The notes explain that the "judge" should actively seek out witnesses and evidence, not passively accept information given. If opposing witnesses are irreconcilably in conflict, the arbitrator will decide whether this management "judge" had reasonable grounds for believing the evidence presented in the inquiry by the employer's representatives.[17]

A Controversial Issue

Certainly not everyone takes so expansive a view of the pre-disciplinary requirements of just cause. For example, Clyde W. Summers identifies certain accepted principles of procedural fairness, such as the expectation that the charge be specified, that the specified offense be proven, that the disciplinary action be taken in a timely manner, and that the penalty may not later be increased. But, in Summers' view, the employee "is not entitled to a hearing before discipline is imposed, unless the contract so provides; but in arbitration, he obtains a full de novo hearing." [18]

Even when the contract does provide procedural requirements, there is less than unanimous agreement about the effect of a violation of such provisions. In his classic 1958 NAA paper, Wirtz asserts that contract procedural rules are usually enforced "to the letter," even when the result offends the arbitrator's sense of equity.[19] But following a review of reported cases, R.W. Fleming observed in 1965 that, while all arbitrators consider a contractual due process requirement important, some arbitrators will nullify the discipline if due process is violated, but most will only mitigate the penalty. Fleming found a few cases in which a violation of a procedural requirement did not affect the penalty at all.[20] Finding such inconsistency troublesome, Raymond Hogler argues from a more contemporary perspective that resolution of a due process dispute appears to depend on "the subjective view of the particular arbitrator in the particular case," with the result that parties are "unable to assess the importance of due process considerations in a given case, and their ability to negotiate an acceptable settlement is impaired." [21]

Pointed debate has been sparked by the proposition that due process in the disciplinary procedure prior to arbitration should be a necessary component of the meaning of just cause. In his 1976 presentation to the 29th Annual Meeting of the National Academy of Arbitrators, Julius G. Getman observes: "The early cases in which due process or equal protection concepts were first adopted apply them without discussion—almost as a matter of course. Later cases more openly enunciate the role of the arbitrator as monitor of the process of discharge, but they treat the function as being so well settled as not to require justification." While characterizing Daugherty's emphasis on arbitral review of management's disciplinary procedures as "somewhat too formal," Getman nevertheless finds it noteworthy "that an able, experienced arbitrator would focus the appellate aspect of the arbitrator's role as the distillation of arbi-

[17] *Ibid.*

[18] Clyde W. Summers, "Individual Protection Against Unjust Dismissal: Time for a Statute," *Virginia Law Review* 62 (1976), p. 504.

[19] Wirtz, p. 9.

[20] R. W. Fleming, *The Labor Arbitration Process* (Urbana, Il: University of Illinois Press, 1965), pp. 136-137.

[21] Hogler, "Employee Discipline and Due Process Rights," p. 792.

tral experience in defining the concept of just cause." [22]

In an extensive discussion of "Industrial Due Process and Just Cause for Discipline," the authors of a 1958 *UCLA Law Review* article assert that the development of "commom analytic and decisional processes by the arbitral fraternity in resolving just-cause-for-discipline grievances has made industrial due process a present, vital, but largely unarticulated, policy." [23] However, the authors add that the actual results "depend upon the predelictions of the individual arbitrator and the facts of the particular grievance" and that mitigation of the discipline is a common decision.[24] Seeing somewhat less commonality, R.W. Fleming observed in a 1961 paper to the NAA that "shop talk among arbitrators has tended increasingly to drift into an area vaguely and uneasily identified as 'due process' .... How far the arbitrator should adopt for himself and impose upon the parties to the agreement judicial concepts such as right to notice and confrontation of witnesses remains a troublesome question." [25]

Standard of Fairness

Not everyone is even that sanguine. As Wirtz points out, Harry Dworkin had taken the position that adoption by the arbitrator of a procedural standard not explicitly required by the contract might violate the prohibition against modifying the agreement. Wirtz disagrees with the Dworkin view, asking rhetorically whether reading procedural safeguards into just cause provisions in contracts is in any way basically different "from reading a status quo rule into the agreement, barring the company's unilateral change of some term or condition of employment not covered specifically in the agreement or the negotiation." He acknowledges, however, a shared discomfort about the problem.[26]

Considerably later, in a 1970 *Arbitration Journal* article, Harry T. Edwards argues strongly against formalizing due process requirements in just cause determinations, urging that "the standard of 'fairness,' which has traditionally been employed by arbitrators as the more flexible replacement for due process, seems far better suited to the composite needs of all the parties." [27] The gap between Edwards and Daugherty is obvious from Edwards' disparaging observation that some arbitrators "have gone so far as to permit procedural defects in the grievance process to affect substantive rights in the arbitration award. For example, in some recent cases where the company has failed to follow a contract provision that calls for a hearing within a specified time or for union representation for an aggrieved employee, the discipline imposed has been set aside or reduced." [28]

Notwithstanding continuing disagreement as to the weight such considerations should be accorded, there remains widespread agreement that just cause as a concept implies at least the broad contours of basic fairness, if not some specific procedural requirements of due process. In fact, Arbitrator Irvin Sobell argued in response to Fleming's 1961 paper that, despite the verbalization of theoretical or philosophical differences concerning due process, "the actual variance between us in practice and in our day-to-day han-

[22] Julius G. Getman, "What Price Employment? Arbitration, The Constitution, and Personal Freedom," *Proceedings of the 29th Annual Meeting*, National Academy of Arbitrators (BNA, 1976), pp. 62-63.

[23] E.L.H., M.L.L., E.H.M., G.E.P., and S.A.S., "Industrial Due Process and Just Cause for Discipline: A Comparative Analysis of the Arbitral and Judicial Decisional Processes," *UCLA Law Review* 6 (1958-59), p. 603.

[24] *Ibid.*, p. 677.

[25] R. W. Fleming, "Some Problems of Due Process and Fair Procedure in Labor Arbitration," *Stanford Law Review* 13 (1961), p. 235-236; also published as "Due Process and Fair Procedure in Labor Arbitration," *Proceedings of the Fourteenth Annual Meeting*, National Academy of Arbitrators (BNA, 1961).

[26] Wirtz, p. 9.

[27] Harry T. Edwards, "Due Process Considerations in Labor Arbitration," *Arbitration Journal* 25 (1970), p. 169.

[28] *Ibid.*, pp. 163-164.

dling of problems is less distinct." [29] John E. Dunsford, responding to Getman's NAA paper in 1976, recognized that arbitrators, faced with deciding questions of fairness of discipline taken without adequate procedures, resolved some problems by incorporating elements of procedural fairness in their decisions. But, he adds, these requirements were "due" because, *in the particular circumstances*, they were "deemed appropriate and fitting *in the special relationships of the industrial community*" [emphasis added].[30]

Initially, Daugherty's formulation of the seven tests grew from precisely this practical, existential problem of judging the facts of a case against the language of the agreement within the context of the relationship of the parties. "Of course it's our business to give just cause its meaning," he explains. "Who else is going to do it? The arbitrator has to—he has the case!" Daugherty disagrees with James E. Jones' observation that parties would increasingly seek specific contractual definitions of just cause in response to arbitrators' expansion of the idea to include "more peripheral individual freedoms." [31] "If they want to define it, fine," Daugherty responds. "I'll apply their definition and not mine without hesitation. But if they choose not to define it, then what they've bargained for is my interpretation of that standard weighed against the particular fact circumstances of their case."

Daugherty's Values

At first glance, Daugherty's initial use of the seven tests certainly appears to invoke a criminal or constitutional law analogy as justification. In *Grief Bros.*, he reinstated a grievant without back pay, although finding the accused employee guilty of the offense charged, primarily because the employee was fired on the spot without any pre-discharge investigation. "Every accused employee in an industrial democracy has the right of 'due process of law' and the right to be heard before discipline is administered. These rights are precious to all free men and are not lightly or hastily to be disregarded .... Maybe X was guilty as hell; maybe also there are many gangsters who go free because of legal technicalities .... Society is willing to let the presumably guilty go free on technical grounds in order that free, innocent men can be secure from arbitrary, capricious action." [32]

It is easy to understand why Hogler, commenting on *Grief Bros.*, concludes that Daugherty's approach "derives from the explicit analogy to criminal jurisprudence, and the interests served by due process are social rather than personal in import." Yet this conclusion leads Hogler, a lawyer, to wonder how a purely legal view of due process, which would justify even the guilty going free, could possibly result in a remedy (reinstatement without back pay) in which, "implicitly, there is a balancing of the equities involved in the specific circumstances." [33]

The explanation, according to Daugherty, an economist by training, is that he never intended a justification based on constitutional or criminal law. Rather, Daugherty asserts that he was using legal terminology simply to express the idea that just cause provisions of collective bargaining agreements must be interpreted in their social context. In our society, civil as well as industrial, just cause has at its root such a fundamental conception of justice and fairness that fairness itself could not exist where due process, usually described with legal terminology, is absent. Daugherty says his basic conception of justice was more influenced by his childhood as the son of a minister, the

[29] Irvin Sobell, Response to Fleming, "Due Process and Fair Procedure in Labor Arbitration," *Proceedings of the Fourteenth Annual Meeting*, National Academy of Arbitrators (BNA, 1961), p. 97.

[30] John E. Dunsford, Response to Getman, "What Price Employment?" p. 76.

[31] James E. Jones, Response to Getman, "What Price Employment?" p. 87.

[32] *Grief Bros.* (1964).

[33] Hogler, "Employee Discipline and Due Process Rights," p. 786.

Rev. Benjamin Franklin Daugherty, than by criminal or constitutional concepts.

"In the first case I ever had with Whirlpool Corporation," Daugherty explains, "I had to put a guy back without pay who was 'guilty as hell.' But the management official acted as judge, witness, prosecutor—everything. I just couldn't allow that. I found the disciplinary attitudes of many employers absolutely antediluvian, and I was frequently finding for the employee." But a generalized and deeply held conviction regarding fairness and justice, combined with the practical imperative of deciding hundreds of disciplinary cases, is neither the whole, nor the most interesting explanation for Carroll Daugherty's conception of due process as a component of just cause. If his ideas about due process were strongly influenced by his personal and professional values, they were also influenced, perhaps even more significantly, by his own particular arbitration experiences, especially in his formative years as neutral. In a curious, indirect, and probably unconscious way, Daugherty's values concerning due process were, in fact, very heavily informed by constitutional rights concepts.

Railroad Arbitration

Carroll Daugherty, like many of his fellow War Labor Board officials, began his arbitration practice soon after World War II. Starting in 1952, he began a long period of service as a referee on the National Railroad Adjustment Board, which would ultimately include three of the Board's four divisions plus numerous special and emergency boards. In fact, Daugherty estimates that he handled an average of 30-60 cases per year as an NRAB referee, which frequently accounted for half or more of his annual case load. The bulk of his remaining cases was private sector arbitrations, usually FMCS panel appointments. This NRAB experience was the foundation for Daugherty's thinking about the relationship between due process, which was guaranteed in great detail in railroad agreements, and "just cause," a concept that rarely appears in railroad industry contract language.

As he explains: "For decades the labor agreements of the railroad operating unions and their carriers have contained specific due process provisions governing carriers' handling of discipline cases. One such provision requires a carrier to bring specific charges against an employee that the carrier proposes to discipline. Another requires notice and fair hearing for the employee before discipline is imposed.

"Referees on the First Division of the National Railroad Adjustment Board, in interpreting and applying such provisions, have developed certain principles, such as: a referee should not substitute his judgment for the carrier's unless there is clear evidence that the latter has abused its discretion in applying discipline; leniency is a function reserved to the carrier.

"In the late 1950s and early 1960s, I had a number of First Division referee assignments. The appendix in my *Grief Bros.* decision . . . was the product of ordering in my mind the essence of my decisions on the First and the decisions of earlier referees like Lloyd Garrison." [34]

Significantly, the NRAB system was designed with the referee as a neutral appellate tribunal who received a fully documented case file ahead of the "hearing." The record included, as its central component, the stenographic account of the carrier's "hearing" into the disciplinary matter at the final stage of the internal grievance procedure. The referee wrote an opinion after the advocates elaborated upon this record in oral argument and provided whatever citations they wished from prior decisions. The grievant and the parties were not present at the

[34] Carroll R. Daugherty, correspondence with the author, January 25, 1985.

hearing to give direct testimony; in fact, backlogs of five years and more from the time of a grievance until the ultimate NRAB decision were not unusual. Because this system had been in place since the 1934 Amendments to the Railway Labor Act,[35] there already existed a very rich history of precedential rulings when Daugherty began his service as a referee.

Due Process Rights

Due process guarantees are easily the most unique feature of the disciplinary procedure in the railroad industry. In fact, the initial volume in a monograph series established in 1953 by the Institute of Industrial Relations at UCLA was *Due Process on the Railroads: Disciplinary Grievance Procedures Before The National Railroad Adjustment Board, First Division.* According to the Foreward to this 38-page monograph by Joseph Lazar, which addresses only First Division decisions, evolving patterns of due process in disciplinary procedure "have found expression in the awards of the Board, which, as a whole, may be considered as a form of industry-wide industrial jurisprudence or common law." [36] In 1980, when the Institute issued Monograph No. 25, *Due Process in Disciplinary Hearings: Decisions of the National Railroad Adjustment Board* by the same author, analysis of the due process awards of all four divisions over more than 45 years required 459 pages.[37]

The first chapter of Lazar's 1980 monograph is "The Fundamental Right to a Fair and Impartial Hearing, Investigation, or Trial in Discipline Cases." Its first topic is "Constitutional Rights and the Collective Bargaining Agreement." The monograph begins: "The constitutional requirements of due process of law, equal protection of the laws, and other constitutional prerequisites must be observed in the administration of discipline." Lazar describes this constitutional and contractual nexus succinctly: "On the premise that '[t]he Supreme Court of the United States has held that the rights afforded under the agreements involved in cases before this Board are, in fact, property rights,' the board has held that '[i]t is our responsibility, then, to ascertain whether or not an employee has been denied his property rights without due process of law. If the organization successfully proves to this Board that due process has been violated, then we will hold that such violation is *fundamental,* [emphasis added] and can be raised at any stage in the proceedings.' " [38]

While observing that the inquiry into due process "is not subject to a cookbook recipe approach," Lazar outlines its essence: (1) timely and adequate notice of the charge or charges against the employee; (2) a reasonable time period within which to prepare and perfect the defense; (3) the right to competent counsel; (4) the right to produce witnesses, to adduce testimony, to present other evidence, and to make proofs and argument; (5) the right to confront and cross-examine hostile witnesses; (6) the privilege against self-incrimination; (7) the right to receive the record or transcript of the trial within a reasonable time after the conclusion of the proceedings; and (8) the right to appellate review.[39]

This expansive due process protection was, of course, immediately apparent to any NRAB referee. "I was struck by it," Daugherty reflects. "It had obviously been well accepted by both parties long before I arrived." Two characteristics of the system in which Daugherty spent his formative years as an arbitrator and which accounted for at least half of his

[35] 48 Stat. 1185, June 21, 1934.

[36] Joseph Lazar, *Due Process on the Railroad: Disciplinary Grievance Procedures Before The National Railroad Adjustment Board, First Division* (UCLA, 1953), p. v.

[37] Joseph Lazar, *Due Process in Disciplinary Hearings: Decisions of the National Railroad Adjustment Board* (UCLA, 1980).

[38] *Ibid.*, p. 19 [from Third Division Award No. 14031].

[39] *Ibid.*, p. 26.

caseload are of special note. First, his own frequent use of legal terminology in his opinions and in the seven tests must be understood in this particular context: legal idiom was the lingua franca of any discussion of railroad discipline and had been for many years prior to his service as a referee. Second, the particular due process rights recognized by the NRAB as the practical, if not legal, equivalent of constitutional property rights were, as are property rights, distinctly *individual*, not collective, in their possession—including the right to 'appellate' review of an employer's disciplinary action by a referee.

In his Foreward to Lazar's 1980 monograph, UCLA Professor Frederic Meyers notes that many of the railroad principles of due process and equal protection, which "have also become well-established in other industrial sectors and in public employment, find their precedents in the Railway Labor Act, its administration, and the administration of collective bargaining agreements in the railroad industry." [40] Carroll Daugherty's seven tests were the mechanism through which contractual due process guarantees, which had their foundation in constitutional rights and which were fully compatible with his own value system, were translated into elaborated, equivalent protections in purely private sector agreements having no such explicit guarantees.

First Use of Just Cause Tests

Daugherty's seven tests of just cause in the private sector *Grief Bros.* case were a natural extension of his railroad experience. This conclusion is supported by both its apparent facial validity and Daugherty's retrospective reflections. Even more convincing, however, is that the conceptual origin of the seven tests can be traced directly to the railroad experience in straight-line fashion through the historical record of his own decisions.

On September 10, 1958, the Third Division, with Daugherty as referee, issued Award No. 8431 in a discharge case, in which the union argued that the carrier's disciplinary procedure contained numerous procedural defects in violation of the specific provisions of the agreement. For the first time, Daugherty chose to enunciate a set of standards which, he asserted, are firmly grounded in the principles of "a long series of awards on discipline cases since the inception of this Board," and which he would use as his yardstick in future disciplinary cases. His rationale put forward eight such major principles, one of which, the requirement that disciplinary action must not be "unreasonable, arbitrary, capricious, or discriminatory," contains eleven individual criteria. Within this group of 19 individual standards can be found the concept and sometimes even phrasing of what would become his seven tests, many of the explanatory notes, and much of the introductory explanation.[41]

It is notable that the carrier members issued a vigorous dissent from Daugherty's award, calling it "ill-advised and palpably wrong" because, in their view, the record demonstrated that the grievant was guilty, had been treated properly, and was reinstated solely "because of what can only be termed as an assumed technicality having nothing to do with the propriety of the discipline." [42] On the same day, Daugherty issued Award No. 8432, in which he applied the same standards. Again, the carrier representatives issued a vigorous dissent, partly on the grounds that many of the principles put forward by Daugherty in the earlier case "were not cited or relied upon by either

[40] *Ibid.*, p. vii.

[41] National Railroad Adjustment Board, Third Division, Award No. 8431 (Daugherty, 1958). It is hardly surprising that Daugherty remembered nothing of this incipient form of the tests in pre-*Grief Bros.* railroad cases when he was interviewed more than 25 years later in 1985. The relevant NRAB awards were discovered in later research.

[42] *Ibid.*

side in the instant case and are not applicable to the facts of record in this case." [43]

Thus, the criticisms that the due process elements of the seven tests are mere procedural technicalities and that the principles actually represent no more than the arbitrator's personal, external standards not agreed to by the parties were not new to Daugherty, even when the tests were in their nascent form. But his response was simply to continue to use and refine the tests because they worked for him.

Translation to the Private Sector

On February 5, 1960, Daugherty issued *Allby Asphalt & Rfg. Co.*, an FMCS case.[44] A comparison of his analysis in that private sector award with his NRAB Third Division Award No. 8431 provides a picture of the point at which, at least in the surviving published record, he translated the railroad principles into their private sector counterparts. "Applying the relevant principles for deciding discharge cases set forth in previous opinions," Daugherty discusses six conclusions taken in exactly the same order and with virtually the same phrasing as the first six criteria he used to determine arbitrary, capricious, or discriminatory disciplinary action in Award No. 8431. His seventh and last conclusion discusses the union's charge that a due process provision in the contract had been violated. Notably, Daugherty finds that the violation did, in fact, occur but that it did not prejudice the contractual rights of the grievant. He denied the grievance.

Thus, Daugherty did not simply take contractual due process guarantees from the railroad industry and mechanically read them into private sector agreements. Nor did he automatically give explicit contractual due process provisions the same weight they would be accorded under decades of NRAB precedent. From their first application in the private sector, then, what would become the seven tests were used flexibly, not dogmatically, as an interpretive tool.[45]

During this period, Daugherty explains, "I was in the process of evolving a list of criteria. In *Grief Bros.*, I decided to codify them. I just sat down and drafted, totally out of my experience." Except for the small addition of (b) to question 2 in *Enterprise Wire* (1966), the tests themselves remained unchanged thereafter. In the appendix to *Grief Bros.*, in which the tests appear for the first time, together with elaborative notes and an introductory explanation, Daugherty makes no reference to his railroad experience. Rather, he notes simply that "over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of 'common law' definition" of just cause. But in the appendix to *Enterprise Wire*, the most commonly cited of his cases, Daugherty adds note 4 to test 7, which explicitly references the NRAB experience as the origin of his ideas about leniency. There can be no doubt from the record, then, that the railroad experience in general and the principles he developed to test for just cause in NRAB cases in particular were the foundation of Daugherty's seven tests and, specifically, his conception of due process.

Following *Grief Bros.* is a succession of ten published disciplinary awards over the next eight years that apply the seven tests.[46] While the questions themselves are not altered, he occasionally amends the appendix with additional introductory

[43] NRAB, Third Division, Award No. 8432 (Daugherty, 1958).

[44] *Allby Asphalt & Rfg. Co.*, 34 LA 83 (Daugherty, 1960).

[45] See also *Caterpillar Tractor Co.*, 36 LA 104 (Daugherty, 1961) and *Telewald, Inc.*, 39 LA 183 (Daugherty, 1961).

[46] *Combustion Engineering, Inc.*, 42 LA 806 (1964); *West Virginia Pulp & Paper Co.*, 45 LA 515 (1965); *Enterprise Wire Company*, 46 LA 359 (1966); *American Steel Foundries*, 47 LA 508 (1966); *Alcan Company, Inc.*, 49 LA 58 (1967); *Combustion Engineering, Inc.*, 49 LA 204 (1967); *Moore's Seafood Products, Inc.*, 50 LA 83 (1968); *Olin Mathieson Chemical Corp.*, 68-2 ARB ¶ 8630, 51 LA 97 (1968); *Demby Rod & Fastener Mfg., Inc.*, 70-1 ARB ¶ 8293, 54 LA 77 (1969); *Whirlpool Corp.*, 58 LA 421 (1972).

comments or with further explanatory notes to the various questions. His final published use of the tests is in *Whirlpool* (1972), in which he makes several substantial additions to the text of the introduction and notes.

Indeed, *Whirlpool* appears to be an attempt to update the appendix to make it a final, comprehensive statement. From the standpoint of format, Daugherty changes the order of several of the notes. He also elaborates upon the nature of company rules and of insubordination and its exceptions as well as upon the nature of discriminatory treatment and comparability of circumstances. In addition, he makes even more explicit the burden his tests place upon the employer: "It should be understood that . . . it is the employer and not the disciplined employee who is 'on trial' before the arbitrator . . .. In short, an arbitrator 'tries' the employer to discover whether the latter's own 'trial' and treatment of the employee was proper." [47] Obviously, not all arbitrators, and certainly not all advocates, agree with the trial analogy as a description of management's burden to prove just cause.

Although *Whirlpool* is the last published and most complete of Daugherty's statements of the seven tests, it is also his most idiosyncratic and self-justifying use of them, probably due both to a desire to leave a final testament and to some fascinating peculiarities in the case itself and his own relationship to the parties as a regular arbitrator. The opinion, one of his favorites, is Daugherty at his testiest, incessantly crossing rapiers with the invisible employer advocate and clearly enjoying every thrust and parry. "That one was too much for them," he reflects with still unconcealed relish and amusement. "After that they fired me." *Enterprise Wire*, the more durable and economical, has been preferred by editors and commentators to *Whirlpool*, the last and most comprehensive, as the citation of choice for the seven tests.

That the initial purpose of the tests in their question format was primarily utilitarian is obvious from the way in which Daugherty actually discusses their application in his opinions. On reflection, he says he never intended at the time of publication of *Grief Bros.* to "tinker" with them. But although the questions themselves remained unchanged after the minor revision in *Enterprise Wire*, he did begin almost immediately to "fine tune" the introduction and notes as new situations arose.

Flexible or Too Rigid?

Actually, individual factual circumstances almost immediately required him to begin qualifying his answers to the questions by weighting them in order fully to support his ultimate rationale for an award. As one example, in *Olin Mathieson Chemical Corp.* (1968), his answers include: "an unequivocal *yes*" to question 1; "an overwhelmingly strong *yes*" to question 2; "no (although only mildly so)" to questions 3 and 4; and to question 5, "at the most . . . only a very weak *yes*." [48] Similarly, in *Demby Rod & Fastener Mfg., Inc.* (1969), Daugherty "finds very borderline, weak *yes*" answers to questions 3 and 4 and "a moderately firm *yes*" to question 5. Having found a negative answer to question 7(a) and an affirmative response to 7(b), he "holds on balance that the answer to question 7, as a whole, is a weak *no*." [49]

Although Daugherty never actually formalized a weighting system for this purpose, the awkwardness of providing the rationale for an award in such terms was an almost inevitable result of setting out the tests in the form of questions that had to be given specific affirmative or negative answers. Indeed, the sting of some unreferenced criticism is almost palpable in Daugherty's addition to the introduc-

[47] *Whirlpool* (1972).

[48] *Olin Mathieson* (1968).

[49] *Demby* (1969).

tion of the appendix in *Enterprise Wire*: "Moreover, occasionally, in some particular case an arbitrator may find one or more of the *no* answers so weak and the other, *yes*, answers so strong that he may properly, without any "political" or spineless intent to "split the difference" between the opposing positions of the parties, find that the correct decision is to "chastise" both the company and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the company—e.g., by reinstating a discharged employee without back pay." [50]

In fact, in *Alcan Company* (1967), the format of responding to very specific questions becomes unwieldy. In the course of his analysis and discussion, Daugherty explicitly finds the answers to question No. 2(a) and (b) "in general" to be *yes*, but then goes on to explain that, in the factual circumstances of the case, two new, very specific questions had to be posed, and he "finds that the answers to these more specific questions must be *no*." [51]

Thus, it is ironic that Daugherty is frequently criticized for trying to make the standards for just cause too formal, too inflexible. From this critical perspective, Daugherty tries too hard to objectify an essentially subjective decision-making process. Yet, in his own use of the tests, if anything, the opposite is true. The criteria are actually applied with great flexibility, so much in some instances that it may be questionable how really helpful they were to decision-making. At least in their use by Daugherty, the seven tests for just cause are rigid, if at all, only in appearance. And a complete reading of the introduction and all the elaborative notes does much to dispel even the appearance. In reality, they need be no less flexible in their application than other seemingly 'concrete' conceptual requirements, such as the notion of progressive or corrective discipline.

Significance

It has been Carroll Daugherty's passionate conviction that his seven tests, with their very deliberately incorporated due process protections, are a better guarantor of "just cause," on balance, than the even more subjective, traditional, and individualistic arbitral notion of "fairness." In *Whirlpool*, summing up his perspective after eight years of experience with their application, Daugherty adds the following final paragraph to the introductory section of the appendix: "The above-mentioned questions and notes do not represent an effort to compress all the facts in a discharge case into a 'formula.' Labor and human relations circumstances vary widely from case to case, and no formula can be developed whereunder the facts can be fed into a 'computer' that spews out the inevitably correct answer on a sheet of paper. There is no substitute for sound human judgment. The questions and notes do represent an effort to minimize an arbitrator's consideration of irrelevant facts and his possible human tendency to let himself be blown by the variable winds of sentiment on to an uncharted and unchartable sea of 'equity.'" [52] This is his last word on the subject.

That Daugherty has had a substantial impact on the literature of arbitration regarding just cause is clear. The extent to which his seven tests of just cause have had an impact on the decisional processes of arbitrators remains subject to active debate. But perhaps the greatest irony is that, while controversy about due process requirements as an element of just cause continues among arbitrators, the major impact of the tests may have been not on arbitrators at all, but on parties, particularly employers. The genius of Daugherty's synthesis is in its incisiveness, its

[50] *Enterprise Wire* (1966).

[51] *Alcan* (1967).

[52] *Whirlpool* (1972).

specificity and utility in behavioral terms. It is hard to imagine an employer losing a just cause case if management's disciplinary policy and its application survived all of Daugherty's questions and notes. Given the frequency with which the tests are cited, modifying disciplinary policies to meet their standards seems a matter of enlightened self-interest.

Without even considering the added currency the tests will gain through projects such as Koven's, their influence in the construction of disciplinary policies and in the training of supervisors may be easily their most powerful present impact. Daugherty's contribution is so omnipresent in the literature of arbitration and in existing training materials that it may simply have leapfrogged over any arbitral resistance. Because the seven tests make sense in behavioral terms and because they provide yardsticks not only for fairness but also for consistency among supervisors, exposure of the parties to them frequently results in their adoption unilaterally by management. As just one example, the seven tests, unattributed, constitute the entire discussion of "The Concept of Just Cause" in the *Labor Relations for Managers Program Manual* developed by the Governor's Office of Administration of the Commonwealth of Pennsylvania and used statewide for public employee supervisor training.[53]

Future Impact

But the greatest impact in the workplace of Daugherty's efforts may as yet be unrealized. It is labor arbitration that is the fountainhead for the idea of just cause. It is labor arbitrators who have, through their tens of thousands of decisions, so richly informed its dynamic meaning. So much has been written about the eroding 'employment at will' doctrine that the phenomenon needs no elaboration here. But what does deserve emphasis is that the courts are, with increasing frequency, replacing the 'at will' standard with the only available alternative—"just cause."

Even in jurisdictions which show no inclination to blowing with the winds of such change, management attorneys have been quick to urge in both public and private seminars that nonunion employers revise their disciplinary procedures to meet just cause standards and that they even consider voluntary arbitration as a defense in potential litigation. As this development unfolds, the seven tests remain supremely accessible in the literature as the primary comprehensive, practical framework for defining just cause. And, of course, to the extent that protection against unjust dismissal may become a reality for unorganized as well as organized employees as the result of legislation, the model bill under consideration in Michigan and other states speaks volumes about Daugherty's potential influence in the future in the stark simplicity of its central, undefined provision: "An employer shall not discharge an employee except for just cause."[54]

Although he published no more disciplinary awards after 1972, Daugherty continued actively hearing cases until 1983 when, at age 83, he retired from arbitration practice. One year later, he disposed of all his case files. The only award remaining in his library is in a personal copy of volume 58 of BNA's *Labor Arbitration and Dispute Settlements*, which contains the *Whirlpool* decision. In November, 1986, the American Arbitration Association presented Carroll R. Daugherty with its first Lifetime Achievement Award in Los Angeles in recognition of his seminal contribution, the Seven Tests of Just Cause.

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[53] Commonwealth of Pennsylvania, Governor's Office of Budget and Administration, *Labor Relations for Managers Program Manual* (Harrisburg, PA., photocopied, n.d.), pp. 6-10.

[54] Michigan House Bill No. 5892 (June 18, 1982).

Appendix: Tests for Learning Whether Employer Had Just and Proper Cause for Disciplining an Employee

Few if any union-management agreements contain a definition of "just cause." Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of "common law" definition thereof. This definition consists of a set of guidelines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.

A *no* answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such *no* means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guidelines cannot be applied with precision. Moreover, occasionally, in some particular case an arbitrator may find one or more *no* answers so weak and the other, *yes*, answers so strong that he may properly, without any "political" or spineless intent to "split the difference" between the opposing positions of the parties, find that the correct decision is to "chastise" both the company and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the company—e.g., by reinstating a discharged employee without back pay.

It should be clearly understood also that the criteria set forth below are to be applied to the employer's conduct in making his disciplinary decision *before* same has been processed through the grievance procedure to arbitration. Any question as to whether the employer has properly fulfilled the contractual requirements of said procedure is entirely separate from the question of whether he fulfulled the "common law" requirements of just cause before the discipline was "grieved."

Sometimes, although very rarely, a union-management agreement contains a provision limiting the scope of the arbitrator's inquiry into the question of just cause. For example, one such provision seen by this arbitrator says that "the only question the arbitrator is to determine shall be whether the employee is guilty or is not guilty of the act or acts resulting in his discharge." Under the latter contractual statement an arbitrator might well have to confine his attention to question 5 below—or at most to questions 3, 4, and 5. But absent any restriction in an agreement, a consideration of the evidence on all seven questions (and their accompanying notes) is not only proper but necessary.

The Questions

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

Note 3: A finding of lack of such communication does not in all cases require a *no* answer to question 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may

properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

Note: If an employee believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover), unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made *before* its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time, there has usually been too much hardening of positions. In a very real sense, the company is obligated to conduct itself like a trial court.

Note 3: There may, of course, be circumstances under which management must react immediately to the employee's behavior. In such cases, the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b), if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

Note 4: The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

4. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a managment person, there are not witnesses to an incident other than the two immediate participants. In such cases, it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt." But the evidence must be truly substantial and not flimsy.

Note 2: The management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

Note 3: When the testimony of opposing witnesses at the arbitration hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people.

6. Has the company applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

Note 1: A *no* answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," a "fair," or a "bad" record. Reasonable judgment thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing established firm *yes* answers to the first six questions. Suppose further that the proven offense of the accused employee was a serious one, such as drunkenness on the job; but the employee's record had been previously unblemished over a long, continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original "judge," might have imposed a lesser penalty. Actually, the arbitrator may be said, in an important sense, to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonablenes above set forth. In general, the penalty of dismissal for a really serious first offense does not, in itself, warrant a finding of company unreasonableness.

Arbitrator Carroll R. Daugherty

Enterprise Wire Company

46 LA 359 (1966)

[The End]

CONTINUUM OF AUDIENCE TYPES AND TACTICS

1. **OPENLY HOSTILE** understands and actively opposes your position

   - recognize and let them express emotions } separate people
   - show your emotions; establish genuineness } from problem
   - know your BATNA (Best Alternative to Negotiated Agreement)
   - reveal your position and ask them to criticize it
   - try to formulate an agreed-upon problem
   - try to agree upon objective criteria
   - don't bargain over positions

2. **UNFRIENDLY** understands and disagrees with your position but without active hostility

   - focus on interests
   - invent options for mutual gain
   - try to identify BATNA of audience
   - communicate clearly & precisely about areas of disagreement
   - identify shared interests; dovetail differing interests
   - actively listen; clarify; understand; empathize

3. **NEUTRAL** understands your position; unaffected by outcome; no preference for or against

   - identify your interests with audience's interests
   - identify opportunities for mutual gain and for mutual loss
   - identify actions that might change audience's BATNA
   - focus on simple and vivid claims
   - use concrete examples

4. **UNDECIDED** understands your position and cares about the issue but unpersuaded for or against

   - use evidence and authority for support
   - personalize the argument - let the audience feel
   - unbundle position into propositions audience can accept
   - draw conclusions aggressively
   - follow up; reinforce

5. **UNINFORMED** unfamiliar with your position and the issue

   - give special attention to clearly organized argument
   - invite requests for clarification; engage in learning
   - use evidence and examples for support
   - make the argument lively; genuine
   - don't overwhelm or bury the point

6. **SUPPORTIVE** understands your position and positively inclined but not yet ready to act

   - clearly describe the action desired
   - use examples to intensify commitment to your argument
   - openly counter possible hostile attacks
   - reveal yourself; identify with audience

7. **ENTHUSIASTIC** understands and actively agrees with your position

   - identify unfinished work or common enemies to be overcome
   - transfer existing commitment to new or additional goals
   - invite expression of positive feelings about your argument

Adapted from:

- William L. Nothstine, Influencing Others (Los Altos, CA: Crisp Publications, 1989)
- Roger Fisher and William Ury, Getting to Yes (New York: Penguin, 1983)

GUIDELINES FOR INTERPRETING CONTRACT LANGUAGE

(Elkouri & Elkouri, How Arbitration Works, 4th ed, 342 ff)

Ambiguity

"There is no need for interpretation unless the agreement is ambiguous. If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators.

"An agreement is not ambiguous if the arbitrator can determine its meaning without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. But an agreement is ambiguous if "plausible contentions may be made for conflicting interpretations" thereof. Moreover, it is recognized that whether a document is or is not ambiguous is a matter of impression rather than of definition; and this is obviously so, because each provision "may be as clear and definite as language can make it, yet the result of the whole be doubtful from lack of harmony in its various parts." (342)

[e.g. Ambiguity: "Mary was a small farmer's daughter."]

Intent of the Parties

"The rule primarily to be observed in the construction of written agreements is that the interpreter must, if possible, ascertain and give effect to the mutual [emphasis added] intent of the parties. The collective agreement should be construed, not narrowly and technically, but broadly and so as to accomplish its evident aims.

"In determining the intent of the parties, inquiry is made as to what the language meant to the parties when the agreement was written. It is this meaning that governs, not the meaning that can be possibly read into the language." (348)

Clear and Unambiguous

"If the language of an agreement is clear and unequivocal, an arbitrator generally will not give it a meaning other than that expressed. . . . Even though the parties to an agreement disagree as to its meaning, an arbitrator who finds the language to be unambiguous will enforce the clear meaning. . . ."

"Arbitrators apply the principle that parties to a contract are charged with full knowledge of its provisions and of the significance of its language. . . . Thus, the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases the result is based upon the clear language of the contract, not upon the equities involved."

"Nonetheless, where very broad language has been used an arbitrator might refuse to apply it literally, but apply it restrictively so as to produce the intended result." (348-350)

Interpretive Guidelines For "Ambiguous" Language" (350-365)

1. Interpretation in Light of the Law
   -- Parties Presumed to have Intended a Valid Contract

2. Normal and Technical Usage
   -- e.g., "May" is Permissive Absent Evidence of Contrary Intent
   -- Dictionary Definitions May Aid if Not Contradicted/-tory

3. Agreement Is To Be Construed as a Whole

   a. Giving Effect to All Clauses and Words

   b. Avoiding Harsh, Absurd, or Nonsensical Results

   c. To Express One Thing is to Exclude Another

   d. General Words Following Specific Take Meaning from Specific

   e. Specific Words Govern General

   f. Construction in Light of Context as Locus of Meaning

   g. Avoidance of Forfeiture

   h. [Mutual] Intent Manifested in Precontract Negotiations

4. No Consideration Given to Compromise Settlement Offers

5. Expertise of Negotiators a Factor to be Considered

6. Custom and Past Practice of the Parties

7. Industry Practice as a Guide Unless Local Practice Differs

8. Prior Settlements as Aid to Interpretation But Not As "Precedent"

9. Interpretation Against Party Selecting the Language

10. Company Manuals/Handbooks -- Relevant Regarding Notice but
    Not Dispositive Because Unilateral

11. Agreement Enforced Over Contrary Externals (e.g. Insurance Policy)

12. Reason and Equity -- That Course Which Does the Least Violence to
    The Judgment of a Reasonable, Equitable Person

GRIEVANCE CASE STUDY INSTRUCTIONS

This exercise is designed to build skills in negotiating grievance settlements and in analyzing the merits of grievances which cannot be settled. Because its basic objective is in building conceptual skills, the exercise will ask you to do tasks or assume roles which are not typically a part of "real world" grievance processing. But your own actual grievance processing will be more effective to the extent that you can incorporate the thought processes learned through this exercise into those "real world" tasks.

You will be provided with a case description (sometimes in the form of a role play) containing relevant background information, facts, and contract language. It is important that you accept the case as presented as the starting point. This will require you first to identify and then to put aside your personal responses to what the characters have done or not done and, at various points, to assume their roles. Don't "fight" the information given; if you would not have done what a given character did, you must nevertheless suspend your judgment about that course of action and make the best of the situation in which you find yourself. If it is a strong one, identify and articulate those factual propositions which make it strong and work to develop further their power. If it is a weak one, make the best of it that you possibly can. After developing each party's strongest "theory of the case," there will be ample opportunity for disinterested analysis requiring your personal judgment and expertise.

The case study exercise requires you to "wear different hats" as you assume various union and management roles. At times this will be difficult or confusing. You will have to keep in mind at all times exactly what you should be doing at any given stage. Regularly review these instructions and, before completing each part, it would be well for you to ask yourself:

1. What is my role?
2. Who is my audience?
3. What are my objectives?

The exercise consists of eight parts with point values noted that total 100 points. Note carefully that you are being placed in a situation calling for specific, practical responses, not lengthy narrative essays. Don't write <u>about</u> the response that should be given (what you "<u>would</u> say"), write the response itself (what you <u>do</u> say), directly, thoroughly, concisely. Because of the nature of the exercise, the persuasive power of your writing will be extremely important. You will need to identify clearly the contractual issues and then frame factual propositions with precision, supported by examples, evidence, and arguments, that support your "Theory of the Case." Your writing needs to connect these with each other and lead to your conclusions.

I. The Grievance (5 points) 1/2-1 Page

Write the grievance as the union official responsible for filing it. Supply all the required information which you have available to you. Do not attempt a full, descriptive development of the union's theory of the case; that will be done in part III. But write the strongest, most effective position you can, articulating clearly the issues to which you're asking management to respond.

For example, do not simply write "Grievant was discharged without just cause" (as it might, indeed, be done in the "real world"), but rather also indicate concisely and precisely how or why management lacked just cause for the discipline, e.g., "... because the discipline was excessive and punitive rather than corrective." Be certain to specify with precision the relief sought and for whom it is being sought. Obviously, be accurate with the technical/contractual information required (dates, contract provisions, etc.)

II. Management Negative Response (5 points) 1 Page

Write the strongest negative response to the grievance filed as the management official responsible for writing the management response at the step immediately prior to the last internal grievance procedure step (i.e., the step which precedes the final grievance meeting before arbitration).

It does not matter if you personally believe the grievance should not be denied: your task is to write the most effective denial you can. Do not attempt a full, descriptive development of management's theory of the case; that will be done in part III. But write the most effective, concise management position you can, responding to each major point of the union's grievance.

III. Theories of the Case (30 points) 4-5 Pgs

Assume you are the person who has been responsible for this case as it has developed in the lower steps of the grievance procedure. Write a confidential memorandum to the person who will be responsible for representing your side at the Final Step Grievance Meeting in which you articulate your party's strongest "Theory of the Case."

Your task is to persuade, to show why your conclusion is the best, the most reliable, the most accurate view of the facts. You can't just say that it is, you must show that it is by arranging factual evidence and illustrations in support of factual propositions within an overall context that rings true as a plausible explanation of the facts.

Latin: monstrare, to show.

DEmonstrate: to show or point out clearly; to prove; to make evident through specimens and examples

REmonstrate: to declare one's feelings in a demand or protest; to expostulate or argue.

Your task in constructing the union's best Theory of the Case, for example, is to show how the employer violated the agreement, not simply to tell that he did. Telling merely remonstrates; it simply states what your conclusions are; it demands that your audience agree solely because the conclusions have been declared. But mere telling does nothing to persuade your audience that your conclusions are valid or worthy of belief, not even "just for the sake of the argument."

To persuade, you must show why and how you reached your conclusions; to convince, you must show why and how they represent the best explanation for the facts. You must lead the other party (or the arbitrator) by way of "proven" (i.e., demonstrated) facutual propositions to the conclusions you want to be reached. For example, don't just say that management violated the just cause provision by failing adequately to investigate an incident that led to discipline. Show that they failed adequately to investigate, i.e., establish the meaning of "investigation" and the elements of "adequate" and then demonstrate how management's actions failed to meet these criteria with evidence and examples.

Use creative problem-solving methodologies such as brainstorming to discover how you can support the factual propositions that will make the contractual language work for your point of view. What does the term in question mean, in either its specialized, "word of art" meaning, if it has one, or its ordinary, dictionary meaning? How can you show that the actions in question are consistent with the meaning of the contract -- or show that they are inconsistent? Literally, at every point in your argument where you have stated a conclusion, no matter how large or small, you must be able to answer the question, "How have I demonstrated that point?"

Fantasize about unconventional, novel ways to establish the point. Don't judge what comes to mind until later; concentrate on exhausting all possible ideas, even impractical ones. Impractical ideas can always be rejected later; allowing yourself to "have" them opens up possibilities for triggering a related idea which may, in fact, be practical, but which otherwise would not have been even entertained.

ALWAYS STATE YOUR THEORY-BUILDING PROBLEM IN OPEN-ENDED, POSITIVE TERMS: THE PROBLEM IS, HOW CAN I ....? GUARD AGAINST THE TENDENCY, ESPECIALLY IF YOUR "GUT" SENSE OF THE CASE IS THAT YOUR SIDE IS WEAK, TO STATE THE PROBLEM AS A SELF-DEFEATING, SELF-FULFILLING PROPHECY: "THE PROBLEM IS THAT I CAN'T ....."

Your task is to find enough persuasive arguments individually that, assembled into a comprehensive Theory of the Case, will convince the other party (or, later, an arbitrator), that you are right in your interpretation of the contract as it applies to the facts of this case:

Persuade: to cause a person to believe something by reasoning.

Convince: to cause a person to feel that a belief is true.

Thus, you want to persuade your audience that your Theory of the Case is that comprehensive view of the facts that most accurately, most consistently, most believably describes the real situation which occurred in light of the requirements of the contract language.

You will need first to discern what propositions must be proven in order for you to win the contractual argument, to isolate the essential elements of the case. Identify, discuss and support each of these key propositions, concisely but completely. Write the strongest possible arguments for your party's best possible position on this grievance. Your Theory of the Case must be as persuasive as the facts allow it to be. It must exploit and expand the power of all points in your favor. It must also deal with weak points, attempting to minimize their influence in the contractual argument. The strongest possible Theory of the Case is not one which ignores weak (and therefore damaging) points rather than dealing with them. You should try either to render each weakness in your case either irrelevant or to decrease or neutralize its potential for damage to your argument.

In order to prepare your representative for the meeting, you must anticipate the other party's attack on these weaknesses and suggest the strongest possible defensive response. Don't send your representative to the meeting without adequate preparation! Your party will be hurt badly if your representative must deal with surprise.

Confidential Memoranda to be written:

A. Union: steward to chief steward (15)
B. Management: line manager to Industrial Relations Manager (15)

IV. BATNA Analysis: CAN WE WIN [at arbitration] ? (30 points) 4-5 per

In order best to judge whether to try to settle the grievance at the final step, parties need to have clearly in view their prospects of winning at arbitration. In Getting to Yes, Roger Fisher and William Ury discuss the process involved in this analysis by using the concept of Best Alternative to a Negotiated Agreement (BATNA). In grievance processing, the question of settlement is whether arbitration is the BATNA. Parties must assess whether arbitration (as BATNA) is in fact so favorable that it is preferable to some alternative settlement. If it is not, settlement must be considered. If it is preferable to settlement, one must know precisely why and have confidence that the case can be won.

Assume that you are a staff member with contract administration expertise. After considering the confidential memorandum written for your party in Part III, researching arbitration principles regarding the issue, assessing your strongest possible arguments as presented in Part II, and reflecting on the total grievance record, write a confidential BATNA analysis for the person who will be representing your side at the Final Step grievance meeting.

Your task is candidly and honestly to assess your prospects at arbitration. That is, estimate the prospects for winning, losing, or splitting on the merits if the case proceeds to arbitration. In order to undertake this analysis, it is helpful for you to look at the grievance record and the arguments of the parties as an arbitrator would, since your task at arbitration will be to persuade an arbitrator that your Theory of the Case has the strongest contractual merit.

Therefore, you must consider how an arbitrator will test the issues in his/her own mind. What discrete factual propositions will have to be proved for your side to win? What is the central core of the logic of the arbitrator's decision that will have to be established? Think of this task as testing a logical proposition: If A + B + C, then D, where A, B, and C are the propositions which must be demonstrated in order for the arbitrator to adopt D, your conclusion about the contract.

For example, if you are analyzing a discipline case for Management, you must test the key factual propositions leading to the conclusion that you had just cause, e.g., whether you have fairly investigated; whether the employee was on notice about the rule and the consequences for breaking it; whether the "punishment" fit the "crime," etc. It is each of those elements (A, B, and C) which must be analyzed. Did you PROVE it in the Theory of the Case? If so, how? If not, why can't you?

For instance, how will you prove you fairly investigated? Can you demonstrate persuasively that you did? How will you do so? Describe your actions and how you will put them into evidence. How will you prove the employee was on notice? Was the rule posted by the time clock? Is it discussed in the employee handbook (and can we prove he had a copy)? Is it covered at all new employee orientation sessions (and can we prove the employee attended and that it was discussed in that particular session)? Your analysis of whether you proved the factual propositions at the crux of your Theory must clearly and objectively indicate:

1. What you must prove to win (each specific proposition)
2. Whether you can prove each:
   a. If yes, analyze precisely how you will do it.
   b. If no, analyze precisely why you can't.
3. In light of 1 & 2, can we win?

In order to guard against deceiving yourself, you should answer the questions above in exactly that order. Then and only then, assess whether we can win. **DO NOT REACH THE CONCLUSION FIRST!** Avoid even thinking about the conclusion until you have clearly established the logical chain of what must be proved and analyzed objectively whether you will be able to prove each proposition. Then assess your chances of winning. This is the time when you must know, after considering your strongest possible arguments, whether in fact your case is strong and you should stand firm or, to the contrary, that arbitration is not your Best Alternative to a Negotiated Agreement.

Confidential Memoranda to be written:

A. Union: contract administration expert to chief steward (15)
B. Management: contract administration expert to IR Manager (15)

* NOTE: It is entirely possible in a close case on the merits that you could come to conflicting conclusions as to what an arbitrator would decide. If your conclusions do conflict, indicate with an asterisk which analysis you personally believe is the most valid.

V. BATNA Tactics: Can the Other Party's BATNA Be Changed? (5 points) 1 page

Sometimes the other party appears to have such a strong contractual argument that arbitration appears to be its BATNA, i.e., preferable to a negotiated settlement. Step outside of the grievance procedure and the merits of the case. Are there ACTIONS within the context of this case that either side could take which might change the BATNA assessment of the other, i.e., which might make arbitrating the case less attractive as an option than it now appears to be or settlement more attractive?

For example, if the issue in dispute is sensitive, a union might organize a letter-to-the-editor campaign in the local newspaper or perhaps informational picketing if it believed this would 1) garner helpful public support and/or 2) embarrass management with the glare of publicity. Such attention might cause management to recalculate the benefits of settling rather than enduring the publicity for the time arbitration will require even though it has a strong case.

Sometimes, creative actions by one side or the other, using "carrots" and/or "sticks" to link the dispute to some other important, related issue or to enlarge it to encompass other issues can jolt the other party out of the security and desirability of an apparently strong contractual position and cause it to recalculate its BATNA and consider settlement. Sometimes, actions taken as BATNA tactics may make it possible to include something from which one party will achieve at least some gain, as part of a settlement to be offered, that would not otherwise have been linked to the issue.

Brainstorm possibilities for actions by either party which might change the BATNA of the other. Evaluate the possibilities you've generated, identify any you believe may be practical options, and explain why you believe it may change the BATNA analysis of the other.

VI. Identifying and Articulating Interests (10 points) 3-4 pages 2er (2)

Having developed your strongest possible arguments by constructing a Theory of the Case in Part III and articulated your BATNA by analyzing the prospects at arbitration in Part IV, one more step is required before your representative can enter the Final Step grievance meeting fully prepared. You must analyze this situation in light of your interests, not simply the positions you have taken about the meaning of the contract language.

Consider this description from David A. Lax and James K. Sebenius, The Manager as Negotiator (Free Press, 1986, pp. 68, 70):

> Negotiators seek to reach agreement on specific positions on a specific set of issues. For example, a potential employee may initially demand $36,000 (her position) for her salary (the issue). Her underlying interests may be in financial security, enhanced lifestyle, organizational status, and advanced career prospects. Or [consider when] the desire of a midwestern electric utility company to build a dam [might collide] with farmers' needs for water and environmentalists' concern for the downstream habitat of endangered whooping cranes. Increased economic return, irrigated crops, and preserved species were the relevant interests; the parties conflicted over the issue of the dam's construction, and took positions for and against it. . . .

Thus interests should be distinguished from issues and positions. Focusing on interests can help one develop a better understanding of mutual problems and invent creative solutions. But such a focus may not always be desirable when, for example, underlying interests are diametrically opposed or when a focus on particular issues or positions provides leverage. Whatever the focus, however, interests measure the value of any position or agreement.

The task in this section is to discover and articulate the real, underlying interests of each party in order to assess whether they should consider changing their positions on the contractual issue in dispute in order to reach a negotiated settlement at the Final Step. Interests are not the equivalent of the desire to "win" or to avoid "losing;" rather they explain "why" or "what" one wants to achieve.

Continue to assume you are the staff member with contract administration expertise who provided the confidential, objective analyses in Part IV. Identify what your party's interests are underlying the position you've taken on the contractual issue. Consider the following questions as you think through the process of identifying underlying interests:

1. Why have we taken the position we have? (be specific)
2. Why won't they adopt our position? (be specific)
3. What, if it occurred, would make this issue disappear?
4. What would make it unnecessary for us to pursue this grievance?

For example, in a disciplinary case, a union which has taken the position that the grievant must be reinstated with full back pay may, after analysis, decide that its arbitration (as its BATNA) has fundamental weaknesses, e.g., although the penalty is too severe considering the infraction, the grievant's record, inconsistency in enforcement, etc., the grievant is not guiltless. The union must identify interests which will allow it to find merit in changing its position: it will want to negotiate, if it can, an acceptable reduction in discipline and will find that preferable to arbitration, where it risks losing the entire case or, at best, achieve the settlement it may be able to negotiate now without the delay and expense.

Similarly, an employer who has taken the position of rejecting the grievance might decide that arbitration (as its BATNA has fundamental weaknesses because it cannot meet the entire burden of proving just cause. Are there interests which, if identified and examined, might lead the employer to change its position? Consider, for example, the need to retain at least some discipline so as not to undercut a foreman who made the disciplinary decision. After thorough reflection on its interests, either party (or both) might decide that its interests are not furthered by negotiated settlement but rather are advanced by standing firm and inviting arbitration because the case is very strong or because the underlying interests are fundamentally opposed.

Confidential Memoranda concisely identifying Interests to be written:

A. Union: contract administration expert to chief steward (5)
B. Management: contract administration expert to IR Manager (5)

VII. Shared Interests: Opportunities for Mutual Gain (5 points) ~~20~~ (27

In virtually all conflicts in which the parties have an ongoing relationship, a dispute reflects not only divergent interests but also shared interests. Particularly in the adversarial atmosphere of the grievance procedure, these shared interest may go unrecognized. It is important to identify and articulate them because they may represent opportunities for mutual gain which are of sufficient potential value that exploring them may cause a recalculation of the BATNA.

For example, consider a case revolving around problematic discipline to an individual in a situation of major on-going theft. Management could become trapped in the position that it cannot compromise on the discipline given, even though it may have just cause for some discipline but not the level of discipline levied. This may happen because it feels the need to set an example, having finally caught someone, or to back a supervisor. The parties may well have shared interests they have not articulated: management has an ongoing theft problem and the union's help may be invaluable; the union has no desire to condone theft or to appear to be defending thieves. If they turned their attention to their shared interests, might they be able to articulate opportunities for mutual gain which could persuade them to move from dug-in positions and reach a settlement?

Step outside your role for each party for a moment to assume the role of an analyst of this conflict situation. Brainstorm interests which these parties share. Look especially for interests that may be attached to the quality or nature of their ongoing relationship in the context of this dispute. Articulate each specific shared interest you've identified. Evaluate how each shared interest, or all of them collectively, might present an opportunity for mutual gain and explain why and how mutual recognition of such opportunities might change the BATNA of either party or both parties.

VIII. Specifying Prospective Acceptable Settlements (10 points) 27 (2)

In light of your interests, what settlement(s), if any, should either be sought or accepted if the other party offers them at the Final Step grievance meeting in lieu of pursuing arbitration? What settlements might you offer to dispose of the grievance? What settlements would you accept if offered by the other side?

Each of your prospective settlements should flow naturally from one or more of the interests you identified in Part V. None of your prospective settlements should contradict any of those stated interests.

Indicate the acceptable range if multiple variations would be acceptable. Be sure to identify precisely your "bottom line" -- the furthest you would go in accepting a negotiated settlement rather than arbitrate. If no settlement is acceptable, then indicate concisely why your interests favor arbitration rather than negotiation.

Confidential Memoranda concisely discussing Settlements to be written:

A. Union: contract administration expert to chief steward (5)
B. Management: contract administration expert to IR Manager (5)

GRIEVANCE CASE STUDY FORMAT

I. THE GRIEVANCE (5 points)

NAME OF GRIEVANT(S)_____

DATE CAUSE OF GRIEVANCE OCCURRED_____

CONTRACTUAL PROVISIONS CITED_____

STATEMENT OF THE GRIEVANCE:

RELIEF SOUGHT:

II. DISPOSITION (MANAGEMENT NEGATIVE RESPONSE): (5 points)

III-A. UNION THEORY OF THE CASE: (15 points)

II-B. EMPLOYER THEORY OF THE CASE: (15 points)

IV-A. UNION BATNA ANALYSIS: WHAT MUST WE PROVE TO WIN? (15 pts)

IV-B. EMPLOYER BATNA ANALYSIS: WHAT MUST WE PROVE TO WIN? (15 pts)

V. POSSIBLE BATNA TACTICS: (5 points)

UNION:

EMPLOYER:

VI-A. UNION INTERESTS: (list) (5 points)

VI-B. EMPLOYER INTERESTS: (list) (5 points)

VII. SHARED INTERESTS: (list) (5 points)

VIII-A. UNION PROSPECTIVE SETTLEMENTS: (5 points)

VIII-B. EMPLOYER PROSPECTIVE SETTLEMENTS: (5 points)

CASE STUDY MODELS

The following serve as examples, solely for the purpose of examining models, of student responses to the Grievance Case Study assignment.

These models are offered with the permission the authors. They are not put forward as a "perfect" responses to the assignment. But they are illustrations of very solid, very thorough efforts, most certainly high "A"s. They are worth emulating.

Take special note of how the "Theories of the Case" are constructed in each of these models: read them carefully; look at how evidence and arguments are used to develop factual propositions; try to identify what, exactly, makes them persuasive.

Also take special note of how the "BATNA Analyses" are constructed in each of the models. Observe how "what must be proved" is broken down into discrete factual propositions and how the analyses discuss specifically how each proposition will be <u>proved</u> (Demonstrate/Show vs. Remonstrate/Tell) or, if it cannot be proved, why not.

Note the expansive treatment of "Interests" and "BATNA Tactics" in each of these models. Observe how creative problem solving can be used to 'brainstorm' a wide range of interests and potential tactics.

Don't be overly concerned about the length of these model responses. Sections should be as long and thorough as they need to be to respond fully for this individual case; some may be briefer, few will need to be longer. Strive to develop the persuasive arguments in your own case theories and analyses as thoroughly as you can; the length will take care of itself.

Finally, for those models which include them, review the Case Log that accompanies the student response. Observe how it reflects on the assignment as an experience -- as it is being done and afterward -- and focuses on the personal intellectual and emotional processes of doing persuasive and analytical thinking/writing as experienced by these particular authors for these particular assignments.

Donald S. McPherson
Professor of Industrial & Labor Relations
Indiana University of Pennsylvania
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S.I.C. TRANSIT - GLORIA MUNDI

Background

Gloria Mundi has been employed as an Operator for the Statutory Indianapolis City Transit Authority (the public refers to it as "Sick" Transit) for 10 years, first as a bus driver and for the last 8 years as a steetcar (trolley) operator. Transit authority employees are public employees organized and represented by the Transit Employees International Union (TEIU). Private bus companies also operate in the city.

In the early afternoon of Sunday, September 19, she was operating her trolley in good weather and favorable street and traffic conditions on her usual weekend run. Just as she was beginning to apply her brakes on an approach to a traffic signal, a car operated by Max Billingsgate cut sharply in front of her from right to left and stopped abruptly at the light. Reacting quickly, she immediately applied full brakes and was able to bring the trolley to a stop nearly against the car's bumper. Billingsgate honked his horn angrily and, according to Mundi, turned around in his seat and gave her "the finger."

When the light changed, the car quickly accelerated, opening up a half block between it and the trolley, then cut back again into the right lane and slowed down. As Mundi approached a safety island dividing the right and left lanes of Plebeian Boulevard, a four-lane road, the Billingsgate automobile again cut in front of her from right to left, stopped beyond the end of a safety island and discharged a woman passenger who began walking back toward the safety island. Mundi brought her trolley to a stop just behind the beginning of the island. During the investigation the next day, Mundi said the distance was about 20 feet to the car. When interviewed, Billingsgate said the distance between them was 30 feet or more.

Just as the car's passenger reached the safety island, the car began to pull out and the trolley commenced to move at the same time. Watching through the rear-view mirror, Billingsgate saw that his wife had not been picked up, slammed on his brakes, and again stopped the car abruptly, without signaling, directly in the trolley's path. Seeing the stopped car, Mundi applied the trolley's brakes and sounded the horn and gong but was unable to avoid rear-ending the automobile, causing approximately $700 in damage to the bumper and trunk and only paint scratches to the trolley. There were no apparent injuries.

Mundi alighted from the trolley and approached Billingsgate, who also alighted from his car. Mundi says her intent was to exchange pertinent insurance information. But the conversation became heated very quickly and vulgar epithets were loudly spoken. Billingsgate said: "You bitch, why did you refuse to pick up my wife at the island?" Mundi said "What the f--k do you think you're doing?" After more words were exchanged, Mundi said "Listen you f-----g idiot, get your god damn car off the road and out of the way, I've got to call in this accident to the dispatcher and the police." She then returned to the trolley to use the radio.

The altercation drew a small crowd of by-standers on both sides of the street. As she was walking toward the trolley, Mundi was approached from behind and grabbed or touched (eyewitness accounts characterized it differently) on the shoulder by a large male bystander who was not involved in the accident and who walked over from the street. Mundi whirled around and forcefully pushed his arm away screaming, "Get your mother f-----g hands off me." She says she assumed when she first felt the hand that its was Billingsgate. The by-stander said he demanded to know her name because he intended to report the driver for misconduct, to which Mundi replied "Stuff it. I've got f-----g work to do. You didn't see the whole thing and this is none of your god damn business." This exchange also was heard by on-lookers as well as trolley passengers and Billingsgate.

Acting on a citizen's complaint, city police cited Mundi that evening for disorderly conduct upon her return to the garage at the end of the shift. Her supervisor was present. She was told she would be scheduled for a hearing in magistrate's court within 10 days to two weeks.

Following an investigation which included testing the trolley's brakes the next morning, the Operations Manager at her garage, in the presence of the Union steward, notified Mundi that she would serve a three day suspension for the front-end collision, Tuesday through Thursday. Although the Authority had also received complaints from citizens, it initially took no action because of insufficient evidence and began an investigation to try to identify witnesses who would describe the incident. Mundi was required to submit a full "Occurrence Report."

The Steward indicated they wanted an immediate first step meeting and it occurred on the spot, with the Steward contesting the discipline and the Operations Manager denying the oral grievance. They then agreed that it was appropriate to move the grievance directly to step 3 and scheduled a grievance meeting for the next week, on Friday. Mundi did not report for work Tuesday-Thursday, her suspension, or Friday and Saturday, her regular days off. She worked the next Sunday.

The hearing in magistrate's court was scheduled at 9 a.m. the next morning, Monday. A representative of the Authority's Labor Relations staff attended the hearing, at which Billingsgate, one passenger, and two by-standers along the street who witnessed the incident testified. Mundi pleaded no contest to the charge and was convicted of the summary offense of Disorderly Conduct and ordered to pay the fine of $250 and costs. Billingsgate, who by then was claiming a whiplash neck injury, is suing the Authority.

The magistrate's hearing concluded at 10:30 a.m. Mundi reported for work that day at 11:15 a.m. as usual to begin her run. Instead, she was notified at the time clock to come with her steward to a meeting. At that meeting, the garage Operations Manager told her that she was being suspended an additional five days for discourtesy to passengers and the public. The Steward indicated that he wanted another immediate informal step grievance meeting and, as before, management rejected the oral grievance. The steward and a Labor Relations Specialist, who was also present, agreed that the two grievances should be consolidated for processing and that the step 3 meeting would still occur that Friday.

Additional Undisputed Facts

A. The Transit Authority has a unilaterally promulgated, properly communicated performance code, "Violations of General Rules and Procedures," which has been given to all employees, published in the Employee's Handbook, and posted on numerous bulletin boards. The Code was communicated to the union at the time of its adoption seven years ago.

> A. For the infraction "Collision With Vehicle Ahead" (#17c), the code calls for a penalty of "Suspension to Discharge" for the first offense; "Three Day Suspension to Discharge" for a second offense; and "Discharge" for a third offense.
>
> B. For the infraction "Discourteous Treatment of Passengers or General Public (#14a), the code calls for a penalty of "Five Day Suspension" for the first offense and "Discharge" for the second offense.

B. This was Mundi's first offense of either provision. She has some minor violations of other regulations on her record but none within the past 24 months.

C. For first offenses of rule 17c, other operators have been disciplined the same, a little more severely, and a little less severely. The Authority gives each garage's Operations Manager the authority to apply the performance code as appropriate to the incident and there are five garages. Mundi's Operations Manager has taken the position that except in the most extraordinary circumstances, the operator is always responsible for a front-end collision because they are nearly always avoidable. He always gives at least a three day suspension for the first occurrence, assuming no faulty equipment, and admits that other Operations Managers, may give different penalties depending on circumstances, but within the specified ranges.

D. The Authority trains its operators in accident prevention and, in particular, in the observance of safe following distances. In the Employer's "Operators' Guidelines," which all operators are given, the operator is admonished:

> "Keep in mind that you must be able to stop in time to avoid colliding with anything in front of you and at the same time avoid throwing a passenger. Maintaining proper following distance for trolleys is especially important since it is the only defensive strategy available to avoid front-end collisions.
>
> "As a rule when following vehicles outside of the congested area and at normal speeds, YOUR VEHICLE MUST BE ABLE TO BE STOPPED WITHIN ONE-HALF (1/2) THE DISTANCE BETWEEN YOU AND THE VEHICLE AHEAD.
>
> "In close traffic the following distance decreases as the speed increases, but the operator must always maintain sufficient distance to stop without colliding with any obstacle in front of his or her vehicle."

E. Regarding "Accidents," the "Operators' Guidelines" admonish:

> "Discourtesy contributes to accidents and to accident costs by creating a resentful and revengeful attitude in the minds of those involved. Any operator with disturbed emotions is an unsafe operator.

"Your attitude in the first few minutes after an accident often sets up a chain of reactions which may extend down through the history of the entire case. KEEP COOL AND BE CALM. Keep in mind that while it is important to record and report all facts, the public's reaction is also very important. You can do much to swing that reaction in your favor or against you. The proper attitude by the operator can save thousands of dollars in settlement costs.

"At an accident scene, don't talk too much. Don't attempt to establish your rights or fix blame. Control your temper. An angry operator cannot think clearly following an accident."

Pertinent Contract Provisions

Section 104 Management Rights

The Employer reserves all rights and powers of Management, including those conferred upon it by the Constitution and law of the State of Indiana and of the United States and by the Charter of the City of Indianapolis, except as specifically modified by agreement.

Section 105 Discipline

The Authority has the right to discipline employees for sufficient cause using progressive discipline. Discipline includes the making of written record entries as well as reprimands, suspensions and discharge.

Section 106 (D) Grievances and Arbitration

In case any employee suspended or discharged is found to have been so disciplined without sufficient cause, he or she shall be reinstated to his or her former position and paid for all time lost at the regular wage rate. The arbitrator has no authority to modify the discipline assessed by management.

(used with permission)

Cindy Mahan Kissel
LR 641 - Fall 1990

S.I.C. TRANSIT - GLORIA MUNDI

I. Statement of the Grievance

On September 20th, Gloria Mundi, Streetcar Operator, was given a three day suspension for a "front-end collision" (17c) occuring the previous day. One week later she received an additional five days suspension for "Discourtesy to Passengers and the Public" (14a) in regard to that same incident on September 19th. The union contends that Gloria Mundi was not at fault in the accident, and that subsequent verbal exchanges were initiated and fueled by the other participants. We do not believe management has sufficient cause under Section 105 of the contract to discipline Ms. Mundi.

Relief Sought: Revocation of eight day suspension and pay for all time lost.

II. Management Negative Response

Gloria Mundi, after investigation, was found to have committed the infractions, "Collision with Vehicle Ahead" (17c) and "Discourteous Treatment of Passengers or General Public" (14a). It is her first offense on both counts and she is without any major offenses during her employ of ten years. Therefore, as per our policy of progressive discipline in Section 105 of the contract, she was given the first offense disciplines of three days suspensio for the collision and five days suspension for her discourteous treatment of the public. The offenses and penalties are stated in the "Violations of General Rules and Procedures", which has been given to all employees, is in the Employee Handbook and is posted on the bulletin boards. The grievance is denied.

III. Theories of the Case

Union

On Sunday, September 19th, Gloria Mundi was making her usual weekend run as driver of a city trolley. The weather and traffic conditions were good. As she approached a traffic light, a car suddenly swerved at high speed from the right into her path and stopped abruptly as the light changed from yellow to red. Gloria applied the brakes and was able to stop the trolley without jarring anyone in their seats. Looking down, she realized she had stopped close to the car's bumper. Gloria also immediately saw the driver, an angry looking man who honked his horn and gave her the finger. She was astonished. He certainly had no reason to be upset with he

The light changed and the car peeled away. Gloria slowly moved the trolley out. Looking ahead she watched the car. There were no other vehicles between them. The car had changed back to the right lane and was slowing down as if to stop.

Suddenly, it picked up speed and swerved back into the left lane, then screeched to a halt on the highway beyond the end of the safety island dividing Plebeian Boulevard. A woman got out and walked back toward the divider. The divider was not a trolley stop. Any vehicle attempting to pick up or discharge passengers at this point, as Billingsgate had, endangered lives.

Gloria, in the meantime, had again stopped the trolley, a distance of 20 feet away at the beginning of the divider. She waited for the car to move again. When it did she also began to move the trolley.

As she did, the car slammed on its brakes without warning and once again came to a complete halt in the middle of the four lane highway. Gloria reacted quickly, applying the brakes to stop the trolley without injuring any passengers. She was successful in the later, but the trolley was too large and heavy to stop smoothly and quickly even at a low speed. She simultaneously honked the horn as a warning for the driver to move out of the middle of the road but he refused and remained braked.

The two vehicles collided with a soft crunch. The trolley only suffered paint scratches. The car's bumper and trunk were light to moderatly damaged.

Gloria got out of the trolley to inspect the damage and exchange insurance information. The man, Max Billingsgate, leaped from his car. To Gloria's surprise, insurance was the last thing on this man's mind. He didn't even care about the damage to his car. He verbally attacked her, calling her foul names and then referring to his wife. Gloria, stunned, wondered if she was two feet away from a lunatic. She was afaid to show fear - the man might physically attack her. She matched his words with equally nasty ones until it was clear the man wasn't rational. She told him to get his car off the road, worried that another collision might occur. Gloria then left to call for the police and notify the dispatcher.

As she was walking back to the trolley, she felt a hand on her shoulder. Her heart seemed to explode and terror went through her. That crazy man was attacking her! She spun around and pushed the arm away, ready to run for her life. Then she saw it wasn't Billingsgate, but one of the onlookers. She was so relieved and angry at the total stranger's grab on her body that she lashed out at him in the same manner as when she was countering Billingsgate's attack a few seconds before.

When the man demanded to know her name (it was on her uniform) she was exasperated. There was a crowd of people staring. They didn't see what Billingsgate had done, nor did they realize her responsibility for the safety of the passengers, which she had fulfilled. She felt it was none of their business and told the man so, hoping to disperse the crowd.

As it turned out, that citizen filed a complaint. In the evening Gloria was cited by the city police for Disorderly Conduct. At her hearing eight days later, she pleaded "No

Contest". She did not have the money to hire an attorney and did not want to take time off from work to fight the charge. She was ordered to pay $250 and costs, an outrageous fine considering Billingsgate caused the accident and the arguments, received no punishment, and then afterwards pretended to become the victim by way of a lawsuit for whiplash.

Gloria Mundi has been a streetcar operator for eight years and a bus driver for two years before that without ever having an accident. She obeyed all following rules as specified in the Operator's Guidelines for preventing accidents. There was no way she could anticipate every move of a reckless driver. The police did not cite her for causing the accident.

In all three occurences where she had to brake for the car she was following at a safe distance: First, Billingsgate cut in front of her near the light, as if to run it, then abruptly halted. She was able to stop the trolley without much passenger awareness. In the handbook it states "...Your vehicle must be able to be stopped with one-half distance between you and the vehicle ahead." There was no vehicle ahead until a split second before the light changed and that vehicle stopped and established the following distance in a split second.

The second time, at the safety island, she was able to stop twenty feet from Billingsgate when he swerved from the left lane to the right, then screeched to a halt in the middle of a right lane of a four lane highway to put his wife out of the car. Gloria was watching the car and was able to "to stop within one-half the distance". She had maintained, as per the Operator's Guidelines, "...proper following distance...as a defensive strategy" against Billingsgate.

The last time, at the actual accident, Billingsgate started out then slammed down on the brakes to an immediate halt. Gloria, still watching the Billingsgate auto as she started, did not have time to establish a safe following distance. Smoothly starting and stopping a trolley, even at very low speeds takes a lot of space because of its bulk. The trolley had to be under control to caused such minor damage ($700) to the car and not jolt any of the passengers. Slamming on the brakes hard enough to stop in time would have risked "throwing a passenger". There was no other alternative for a trolley. Since they had both pulled out at the same time, the twenty feet between them had changed very little.

Gloria has no incidents on her record of ever being anything less than polite and cheerful with passengers. Her supervisor and co-workers have never found her language to be crude or abusive whether she is in a good mood or not. After a collision, no one is entirely calm and collected. But, she did not have "disturbed emotions" as described in the Operator Guidelines. The woman was confronted with a raging man screaming horrible things. She isn't a psychologist. Her behavior was to meet him "head on", to stand up and not show fear. Her language matched his because she thought he wouldn't have understood anything else. There is nothing in the Operator's Guidelines

about handling emotionally disturbed members of the general public.

Gloria may have seemed emotional, but she never lost control. There was no physical action initated by her. The stranger's grasp on her body was a personal intrusion. Her pushing his hand away was an instinctive response to the threatening situation of Billingsgate. Her words resulted from her fear of Billingsgate and the shock of the stranger's hold on her.

The entire incident was treated as two separate violations of the code with two investigations and two different suspension periods of three and five days. Gloria worked a day and had two scheduled days off inbetween. The total eight day suspension for a first offense of the two charges does not follow a progressive scale by being excessive, and it is without sufficient cause under Section 105. There are mitigating circumstances as described that management did not take into consideration. The entire incident should have been investigated and discipline determined at one time.

Management

Management's eight day suspension of Gloria Mundi was for sufficient cause (Section 105) and within the rights of the Employer (Section 104). The discipline followed the progression described in the "Violations of General Rules and Procedures", in the same degree as other offenders received, and was enacted after an investigation on both counts.

On September 19th, Gloria Mundi drove a trolley that struck the back of Max Billingsgate's auto. As a result, there was $700 in damages to the bumper and trunk to the auto, and paint damage to the trolley. While none of the passengers were injured, the driver of the auto, Billingsgate, is suing the Authority for a whiplash neck injury that could cost the city thousands of dollars even if settled out of court.

It is the position of management that nearly all front-end collisions are avoidable if the driver is maintaining a proper following distance. It is the only defensive strategy available to trolleys and it is essential for a driver to always remember to leave sufficient distance in heavy or light traffic.

We do not dispute the grievant's claim that Billingsgate was driving in a reckless manner. The reason why we stress DEFENSIVE strategy is because of all the unpredictable, careless, drunk, sleepy, (the list goes on) people on the road like Billingsgate. All drivers must be on the defensive. Those who are responsible for many lives, such as bus or trolley drivers, need to be the most cautious of the other driver. The transit driver needs to remain calm and refrain from getting emotional about other drivers. Bad attitudes, such as Billingsgate's "finger" are to be expected when one spends eight hours a day driving in the city. The Operator's Guidelines states "Any operator with disturbed emotions is an unsafe operator".

Mundi had an advantage of two prior warnings that Billingsgate fell into the unpredictable driver category. Twice she avoided an accident. Mundi did not avoid an accident the third time. The distance that separated her from Billingsgate prior to the crash is claimed to be anywhere from 20 to 30 feet or more. Regardless of the number of feet, she should have remained still until the Billingsgate auto was a sufficient distance away. The trolley is equipped with adequate warning signals to alert drivers from behind that it is stopped on the roadway.

The trolley brakes were tested as part of the accident investigation and were found to be in proper operating condition. While Mundi was not cited by police for causing the accident, she is not subject to the same "rules" as the private driver. She is a public employee in the mass transit system with the inherent responsibilities of such a position. She is expected to be a superb driver, virtually faultless. The consequences otherwise would be injuries, fatalities and lawsuits.

Since this is Mundi's first accident, the penalty is mandated to be "Suspension to Discharge". Her Operations Manager has our authority to apply the code as appropriate to the incident. His policy, known to all in his gargage, is an automatic three day suspension for the first offense. The violations code says "suspension" which indicates one day to several days up to and including discharge. In the second offense a three day suspension is the minimum.

Following the collision, Gloria Mundi committed her second violation of the code. Our investigation was completed only after locating witnesses to verify the events. The Operator's Guidelines are very specific on operator behavior following an accident. Mundi violated virtually every statement of advice:

"Discoutesy contributes to accidents and to accident costs by creating a resentful attitude in the minds of those involved...

"Your attitude in the first few minutes after an accident often sets up a chain of reactions which may extend down through the history of the entire case. Keep cool and be calm. Keep in mind that while it is important to record and report all facts, the public's reaction is also very important. You can do much to swing that reaction in your favor or against you. The proper attitude by the operator can save thousands of dollars in settlement costs.

"At an accident scene, don't talk too much. Don't attempt to establish your rights or fix blame. Control your temper. An angry operator cannot think clearly following an accident."

Mundi was highly agitated from the moment she leaped from the trolley without first contacting the dispatcher or police. She confronted Billingsgate in a hostile manner and a shouting match ensued, complete with vulgar language. Mundi called the other driver names and blamed the accident on him. A passerby, offended at the language, stopped and tapped her on the shoulder to requested her name. Mundi reacted in a rage, screamed

profanity at him, refused to give her name, and told him to mind his own business with swear words added. She was never calm, cool or in control of her temper. She talked altogether too much, used offensive speech and actions, blamed Billingsgate and behaved in what may be called an out of control manner.

The public was clearly offended. The Authority received several complaints about the incident. Mundi was cited by the police for Disorderly Conduct, to which she plead "No Contest". Billingsgate, angry at Mundi's treatment of him and the public "scene" it created, sought revenge in the form of a lawsuit for whiplash. Even if the authority wins it will cost the taxpayers money. Public support of the "sick" transit system continues to drop.

The Violations code calls for a five day suspension for the first offense of "Discourteous Treatment of Passengers or General Public (14a). Gloria Mundi received five days suspension.

The total eight day suspension was within contract guidelines on length of suspension and as stated for first offense violations. Management, after investigation, determined sufficient cause for action and was within its right as in Sections 104 and 105 of the contract.

IV. BATNA Analysis: CAN WE WIN [at arbitration]?

Union

To win the case, the Union would have to prove that the other driver was entirely at fault for the accident and and in the interactions that followed. Management's case that Gloria was also at fault for some of the events is very strong. It is very doubtful we could clear her. However, proving Billingsgate's actions as mitigating circumstances might lower the suspension for the collision. If that fails, the only possible defense is to concentrate on the contract language for first offense front-end collisions, and the separate investigations/suspensions for the what should have been one single incident.

The claim that Gloria was not at fault in the verbal exchanges is certain to be lost. She should have remained calm and collected because the responsibility was on her to do so. Swearing and fighting with Billingsgate, and then the bystander, in front of witnesses strengthens Management's case. The "Discourteous Treatment of Passengers or the General Public" violation will hold up in arbitration. Since this is her first offense, and the penalty for a first offense violation is five days, the discipline will stand.

The strongest part of the union's case is in the area of the "Front-end Collision" violation. The first offense penalty for a front-end collision (#17c) is "Suspension to Discharge". The second offense is "Three Day Suspension to Discharge". The performance code is to be unilaterally enforced. Yet, there are five garages with five operations managers who each have a right

to interpret the penalty as they see fit within the guidelines. In the past, violators have been punished the same, more, or less than Mundi. Gloria's Operation Manager always gives out three day suspensions for the first offense except in extraordinary circumstances.

The union would have to prove extraordinary circumstances for the violation of 17c to be dropped. We have shown that Gloria was confronted with an erratic, angry, unpredictable driver. She had to stop for him not one, but three times on a four lane road. The trolley was under control and following guidelines. While the police cited her for disorderly conduct, she was not found by police to be at fault in the accident. There are witnesses to Billingsgate's driving. But Gloria's attitude and actions afterward cast a doubt of her state of mind at the time of the accident. A total clearing of guilt is unlikely. Therefore, we look at the wording of the contract in 17c for a possibility of lowering the suspension because of mitigating circumstances.

First offense is "Suspension to Discharge". Second offense is "Three Days to Discharge". The second offense is meant to be of greater penalty than the first offense, or a suspension of three days or more. Gloria was given the equivalent of minimum second offense punishment. A minimum first offense punishment is one day. "Suspension to Discharge" also indicates there is some latitude for first offense punishment of collisions that might range from almost unpreventable (hence, suspension) to gross negligence.

In addition, she is being punished twice for the same incident. Had the facts been readily available, her suspension would have been designated at one time and could have run concurrently. Instead, it was split into two different, unconsecutive times.

The union has a weak case for clearing Mundi. However, the issues concerning the length of a first offense violation of 17c, and the split suspension are valid arguments. A reduction in suspension might be possible if the contract language is interpreted to mean degrees of responsibility because there is evidence that Gloria was not entirely at fault in the collision.

Management

Management's overall case is very strong with only a few contractual weak points. Gloria Mundi is guilty of "Discourteous Treatment of Passengers and the General Public". We had an investigation and witnesses were produced to confirm her language and actions toward the driver of the car and the bystanders. There is no excuse for her behavior after the accident. She is a representative of the city and it should have been foremost in her mind to conduct herself in a professional manner no matter how the other persons involved were acting. The five day suspension will stand.

Mundi hit the Billingsgate auto. The contract calls for a

suspension on the first offense. If a minimum three day suspension is mandatory for a second offense, the mimimum on a first offense is not clearly stated. On a first offense, should the circumstances and the offender's record be taken into consideration when determining length of suspension or should it be an automatic, set number as exercised by Mundi's supervisor.

One other unclear point is the two investigations into the accident and resulting events. If the witnesses and facts had been available on the same Monday following the accident, would the same number of days in suspension been given or would they have run concurrently? The contract is not specific on two first offense violations being committed in one incident.

This might mean there is some justification for lowering the number of days of her suspension. The Operations Manager gave her three days, as was his custom to do on a first offense. Three days is in the contract as a second offense. The first offense is quoted simply as "Suspension", which could mean any number of days. We do not want to countermand the authority of the supervisor or create feelings of unfairness in employees who were given three days for a first offense in the past.

Thus, to maintain both suspensions and avoid arbitration over an eight day suspension that could appear excessive, management would be willing to have the suspensions served concurrently. The severity of the violations is not diminished. Contract enforcements will be upheld.

V. BATNA Tactic: Can the Other Party's BATNA Be Changed?

Union

The union has several potential ways of making management take a different view. First, Gloria Mundi could threaten to sue Max Billingsgate in civil court for emotional damage and loss wages. That might have some influence on the strength of her case. However, the union would have to foot the bill for an attorney and a court decision could take months with the outcome unpredictable. The union could claim Mundi was suffering from PMS and bring national attention, and monetary support for her cause. Gloria could even appear on daytime talk shows. Unfortunately it might prove embarrassing to Mundi as well as the management.

Management

Management could insist on seminars and in-class training in public relations, getting along with difficult people and stress management. Employees found to be lacking emotional control could be ordered to see the same pyscholgist used by city police. Management could also threaten to put spies on the trolley to monitor operator behavior and install equipment to monitor speed and acceleration properties. All of these projects would require additional funding from the city, taking money away from other departments.

VI. Identifying and Articulating Interests

Union

The union wants to protect its members from being held accountable for all front-end collisions. The language of the contract needs to be more specific on first offense penalties and all of it uniformly enforced. The discipline needs to be progressive and administered at one time. Members need to be protected from long suspensions for first offenses. In addition, Union members need to remain in a favorable public light without having to be treated without respect.

Management

Management wants to insure a safe public transportation system by well maintained equipment and alert drivers who are on the defensive. The image of the public transportation system is not only by vehicle appearance, but by drivers who are intelligent, personable and courteous. Management wants to minimize lawsuits, justified or not, by limiting opportunity and encourage favorable support by the general public.

VII. Shared Interests

Both management and the union want to maintain a good labor-management relationship. The present situation creates a morale problem for drivers and, as a result of Billingsgate's suit, a lower image to the public. Union and management must work together to project a strong, competent, professional image of the public transportation system. Each side wants the contract interpretation to protect its interests and place responsbility, and punishment in a correct and just manner. Both want to insure the safety of personnel, property and the public and eliminate as many accidents as possible.

VIII. Specifying Prospective Acceptable Settlements

Union

(1) Suspension only for the "Discourteous Treatment of Passengers and the General Public" charge. Suspension for the "front-end collision" would be dropped from the record and full pay given for the three days Mundi was suspended.

(2) Suspensions for the two charges to remain but run concurrently and Mundi would be paid for the three additional days she was suspended.

Management

(1) As opposed to arbitration, management would be willing

to have Mundi's suspensions run concurrently and pay her for the additional three days she was suspended from work.

Donald S. McPherson
Professor of Industrial & Labor Relations
Indiana University of Pennsylvania
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AT THE CAR WASH

Background

Delmarva Peninsula, R.N., is a Psychiatric Nurse employed by the West Atlantic Shores Hospital (WASH) in center-city Dover, Delaware. WASH maintains a parking facility (known as the CAR-WASH) containing 231 parking spaces on three levels as part of its physical plant. In order to control parking in the garage, WASH established a procedure of providing numbered parking stickers for a fee on a first come, first served basis.

WASH employs approximately 1450 persons. Approximately 217 stickers, which must be renewed annually, are issued to employees for parking in the CAR-WASH. Over 625 employees are currently on the waiting list to receive a parking sticker, producing a projected waiting period of approximately five years given current turnover rates. The cost of a parking sticker is $48 per month. The area surrounding the hospital is in the center-city and parking is exceedingly difficult to find. There are two commercial parking garages near the hospital which charge $950 annually for a reserved space.

On December 21, a routine check of the parking garage by WASH security personnel revealed that two cars were parked in the garage with the same numbered sticker, #131. When contacted by Security, the authorized holder of the sticker, Dr. Zorba Kazantzakis, reminded them that he had reported his sticker lost or stolen approximately three months earlier and received a replacement bearing the same number. A check of the license plates on the other vehicle bearing #131 revealed that it was owned by Nurse Peninsula.

An investigation meeting was conducted the next day by the WASH Director of Personnel, Otto Freund-Mensch. Freund-Mensch is generally regarded as a friendly man, but he gets very hard-nosed and somewhat righteously indignant when it comes to rule violations. The meeting was attended by the union steward, Polly Mendicant, and Nurse Peninsula. When confronted with the evidence, Peninsula stated that she had found the sticker on the floor of the garage near her car at the end of her shift 2-3 weeks before and that she had been using the sticker since that time. She insisted that she found the sticker -- did not steal it -- and did not know to whom it belonged.

At the conclusion of the investigation two days later, the Director of Personnel called in both the nurse and the steward and informed Nurse Peninsula that she was being suspended without pay for three days and being given a severe letter of reprimand. The letter stated, in part:

> You have admitted knowingly using a parking sticker in an unauthorized manner for 3-4 weeks, paying no fee. The Hospital considers such action to constitute: 1) dishonesty, 2) theft of property, 3) theft of services, 4) self-help, 5) falsification of work records and 6) willful and overt disregard of WASH policies, procedures and regulations.

As a dishonest and fraudulent act, your theft of the parking sticker and theft of services in the unauthorized use of a parking space are also violations of the Code of Responsibility for Nurses and of the responsibilities of a licensed professional practitioner.

The Hospital believes it could discharge you for these major offenses under its written disciplinary policy. However, in consideration of your three years of service, work record, and discipline record, we have reduced this penalty to a three day suspension without pay.

In addition, you are hereby formally reprimanded for your actions and expressly warned that any future violation of the Hospital's regulations, including parking regulations, will be disciplined severely and may lead to your discharge.

Mendicant begged Freund-Mensch to reconsider both his decision and the wording of the letter of reprimand. She pointed out that under the strict wording of the letter, Peninsula could be even be discharged for overparking at a meter in the Hospital's surface lots it maintains for patients, the public, and staff. Mendicant called the Hospital's posture outrageously excessive and arbitrary and promised a Union grievance immediately. But the Personnel Director was unmoved.

Additional Undisputed Facts

A. The Hospital provides all professional employees with a copy of its Professional Staff Handbook which contains unilaterally promulgated rules and regulations. These rules have also been provided to all unions representing WASH employees and are properly posted on all official bulletin boards. The Handbook reads, in pertinent part:

Responsibilities

You are expected to conduct yourself courteously, respectfully, and cooperatively in your relationships with patients and their families, WASH staff, and the general public.

The items listed below are not meant to cover all possible standards, but rather to serve as a guideline concerning some of the performance standards which the Hospital considers to be particularly significant. Failure to meet these standards may result in counseling, reprimand, written warning, suspension, and/or discharge.

* * * * *

Section C - Serious Offenses

To protect the overriding interests of patients and staff, any violation of any of the following will result in immediate dismissal without written warning or disciplinary suspension:

1. Falsification of employment applications or records, including time sheets.

2. Theft or malicious damage to patients, staff, or WASH property.

3. Falsification of work or patient care records.

4. Intoxication or use or possession of drugs on WASH premises if not specifically prescribed by a physician.

5. Physical assault of another staff member or patient.

6. Patient Abuse as defined in current policy guidelines.

7. Acts of willful and overt disregard of WASH clinical or administrative policies or procedures or disclosure of confidential information.

8. Willful disregard of safety, fire or health regulations.

B. Incumbent employees who hold parking stickers must reapply for new stickers around mid-December each year and they are issued by the Hospital to be effective January 1 of the new year.

C. Nurse Peninsula works the 7-3 and 3-11 shifts, rotating shift assignments every two weeks.

D. In order to enter the parking garage, a driver must first insert his/her plastic Hospital identification card into the card device at the garage entrance. About 20 feet inside the garage entrance is a Hospital security office with a large window from which a garage attendant, who is assigned to the Security department, can check incoming cars. To park, a car must have a parking sticker showing on the back of the rear-view mirror.

E. Hospital security regularly patrol the parking garage as part of their assignment and sweep-check for stickers at least once each day before noon during their maximum manning period of 5:30 a.m. to 4:30 p.m. The garage attendant goes off duty at 3 p.m. In practice, the parking regulations are not enforced until 5:30 a.m. the next morning.

F. In the past three years, three professional bargaining unit employees have been discharged for dishonesty. In one case, the employee had falsified information concerning earned college credits on his employment record; in another, the employee altered time sheets to show overtime worked which was not worked; in the third, the employee was found to be engaged in a long-term pattern of stealing hospital medical supplies and covering up the theft with false inventory reports.

G. In the past three years, two professional bargaining unit employees have been suspended for dishonesty. A nurse was suspended for five days for coming in late once and leaving early twice during a single two week pay period and falsifying her payroll-hour report. Also, the Hospital safety officer was suspended for three days for overlooking violations of the Hospital's procedures on proper storage of chemicals.

H. In the past three years, three professional bargaining unit employees have been disciplined for incidents relating to the parking garage. Benjamin Casey was given a written warning for the first offense and a severe reprimand for the second offense of parking in the garage without a sticker. Dick Kildare was given a written warning for parking in the garage with an expired sticker. Mildred Ratchett was given an oral warning for attempting to park in the garage without a sticker; she was turned away at the attendant's station.

I. Both the Nursing Code of Ethics and the State licensing law explicitly condemn dishonesty.

J. Nurse Peninsula has been employed for three years and has a good work record. Her disciplinary record contains only two oral warnings for coming in late which were given in the middle of her first year of employment.

Pertinent Contract Provisions

Article VI Management Rights

Subject only to the limitations stated in this Agreement, the Association recognizes that the Hospital retains the exclusive right to manage its operation including, but not limited to, the right to determine the methods and means by which operations are to be carried out, to direct the work force, and to conduct its operations in an efficient and responsible manner.

Article VII Discipline

A. The Hospital shall not demote, suspend, discharge, reduce in rank or compensation, or in any way otherwise discipline an employee without just cause. An employee may appeal a disciplinary action through the Grievance Procedure.

B. Should a grievance remain unresolved throughout the Grievance Procedure, the Association may demand Arbitration. The decision of the Arbitrator shall be final and binding upon both parties and the aggrieved employee. The Arbitrator shall have no power to add to, subtract from, or in any way modify the provisions of this Agreement. The decision of an Arbitrator must be based only on the express terms of this Agreement and the evidence presented at the Hearing.

Kim Thompson (Spring, 1991-92) (USED WITH PERMISSION)
LR 641 Contract Administration

At the Car Wash

I. The Grievance

On December 24, 1991, Delmarva Peninsula, a Registered Nurse at West Atlantic Shores Hospital (WASH), was given a three-day suspension and severe letter of reprimand for unauthorized use of a parking sticker at the WASH parking facility. In violation of Article VII Section A of the Collective Bargaining Agreement, Ms. Peninsula was disciplined without just cause.

Relief Sought: On behalf of the grievant, the union requests that the letter of reprimand be removed from Nurse Peninsula's personnel file and that she receive full back pay for wages lost due to suspension.

II. Disposition

Delmarva Peninsula knowingly and willfully used WASH parking facilities for an extended period of time in an unauthorized manner. Such action constitutes a number of serious offenses which are punishable under Section C of the Professional Staff Handbook.

Management's suspension of the grievant was for just and proper cause. The grievance is denied.

III. Union Theory of the Case

On December 24, 1991, Delmarva Peninsula, a Registered Nurse in the Psychiatric Unit of West Atlantic Shores Hospital, was given a three-day suspension and severe letter of reprimand for her alleged misuse of a parking sticker to secure a space in the WASH parking facility (CAR-WASH). Management labeled Ms. Peninsula as a "serious offender" and, as such, imposed a three-day suspension upon her which was both excessive and unjust. The union challenges that decision.

West Atlantic Shores Hospital is located in center-city Dover, Delaware, an area notorious for its inadequate parking facilities. To accommodate its employees, the hospital converted three levels of its physical plant into a parking ramp, where approximately 217 spaces are available to WASH employees on a first come first served basis. An employee who is fortunate enough to secure one of those coveted spaces is issued a parking sticker for a period of one year--from January to December--which gives them the privilege of parking in the garage at a monthly rate of $48. The sticker must be displayed on the back of the vehicle's rearview mirror.

WASH employs approximately 1450 persons. A mere 6% of them enjoy the benefit of a secured parking spot, and the demand for a space has produced a waiting list of nearly 5 years, with one-half of all WASH employees on that list--employees who are forced to pay up to $950 annually to park in adjacent garages. Indeed, commuting to West Atlantic Shores Hospital is a frustrating and expensive proposition.

The grievant, Delmarva Peninsula, has been employed by WASH for three years and regularly commutes to work. On or about December 1, when the grievant was leaving work at the end of her shift, she found a discarded parking sticker (#131) on the floor of the CAR-WASH garage. Not knowing to whom it belonged, she picked it up and put it in her car. The next day, and every day thereafter for three weeks, Nurse Peninsula used the sticker without reprisal to park in the garage. She was never stopped by the parking attendant; she was never approached by security personnel; and she was never questioned by another WASH employee about her use of the parking garage--until December 21. On that day, WASH security personnel discovered that two cars were parked in the garage with the same numbered sticker, #131. When contacted by security, the authorized holder of the sticker, Dr. Zorba Kazantzakis, reminded the officer that three months earlier he had reported his sticker #131 lost or stolen and was issued a replacement sticker bearing the same number. A check of the license plates on the other vehicle bearing #131 revealed that the car was owned by the grievant.

On December 22 WASH Personnel Director, Otto Freund-Mensch called Nurse Peninsula to his office for an investigatory meeting. Ms. Peninsula went to the personnel office with union steward, Polly Mendicant. When confronted with the evidence, Nurse Peninsula explained that she had found the parking sticker on the floor of the CAR-WASH 2-3 weeks earlier and did not know to whom it belonged. She admitted using the sticker since that time to park at the facility, unaware that she was violating any CAR-WASH regulation. Freund-Mench concluded the meeting without ever discussing the charges being brought against her or consequences of Nurse Peninsula's actions.

Two days later, at the conclusion of his investigation, Otto Freund-Mensch called the grievant and her union steward into his office this time to inform Nurse Peninsula that she was being suspended without pay for three days and was being given a severe letter of reprimand accusing her of six major offenses: 1) dishonesty, 2) theft of property, 3) theft of services, 4) self-help, 5) falsification of work records, and 6) willful and overt disregard of WASH policies, procedures and regulations. The letter suggested that her discipline was lenient in light of the offense and stated that "further disregard of any hospital rule or parking regulation may lead to discharge." Union Steward, Polly Mendicant, expressed her concern over the strict wording of the letter, which implied that Peninsula could be discharged for something as minor as overparking at a meter on hospital grounds.

Feeling that management's posture was outrageously excessive and arbitrary, Mendicant promised a union grievance.

The union's investigation of the case revealed several facts which support Nurse Peninsula's grievance.

The letter of reprimand given to the grievant referred to her actions as "major offenses" according to written disciplinary policy. They first accused her of being dishonest. Dishonesty is not punishable as a serious offense in the Handbook and management has no evidence that Nurse Peninsula was dishonest at all. In fact, when confronted with the evidence against her, she truthfully admitted her use of the parking sticker and insisted that she *found* the sticker and did not steal it. Accusing her of being dishonest is the same as accusing her of being a liar, and at no time did the grievant lie to protect herself. No nurse that lives by the Nursing Code of Ethics as Delmarva Peninsula does would do so.

Second, management accused the grievant of theft of property, presumably theft of WASH property, according to the letter of reprimand. The union argues that the grievant is not a thief and the parking sticker was *not* WASH property. The parking sticker is a tangible item which was purchased by Dr. Zorba Kazantzakis from the hospital. He pays for the sticker in monthly installments of $48, and when the sticker expires, he can throw it away, use it as a bookmark, a piece of scrap paper or whatever he wants because after December 31, it's no good to anybody. Picking up a discarded parking sticker from the ground hardly constitutes theft of hospital property when the sticker doesn't even belong to the hospital in the first place. Dr. Kazantzakis admitted that he may have *lost* the sticker and he himself could not even prove that it was stolen. Therefore, for the following reasons, Nurse Peninsula was wrongfully charged with theft of property: 1) there is no evidence whatsoever proving the grievant stole the parking sticker from Dr. Kazantzakis, 2) the parking sticker was reported missing three months ago; picking up a discarded sticker that has been on the CAR-WASH floor for nearly three months hardly constitutes theft, and 3) the sticker itself is not WASH property by the very nature of its distribution. Accusing a nurse of theft in a letter which is placed in her personnel file has the potential of damaging her reputation as an employee and she is likely to suffer diminution of the severest sort in the employment community. Any employer who charges a loyal and honest employee with theft better have proof beyond a reasonable doubt before making such a harsh accusation, and management certainly has no proof of theft whatsoever.

Third, management has accused the grievant of theft of services. Her use of the parking garage without paying a fee was for a period of 2-3 weeks maximum. The cash equivalence of this "service" is no more than $36, a negligible amount. Overparking at a parking meter--and getting away with it--could quickly add

up to $36 in theft of services. A few personal long distance phone calls by a manger to his wife in the suburbs would add up to $36 in theft of services in no time. Almost everyone is guilty of taking a pen or pencil, maybe a plain envelope here and there, or something of negligible value from the hospital. Few, if any of those employees--whether managers, doctors or staff--have ever been labeled as a "thief" and slapped with a three-day suspension. And neither should the Delmarva Peninsula. Her use of the parking garage was a picayune loss for the hospital.

The union argues that it is a stretch of the imagination for management to accuse the grievant of falsification of work records. Falsification of a *work* record is generally construed as an willful and deliberate alteration of an official work document, such as a time card or expense voucher, in order to claim a benefit or cheat the company. The union contends that a parking sticker merely represents a privilege for the employees, a privilege they must pay for, and it can not be categorized as an official work document. The grievant may have claimed a unauthorized benefit by parking in the garage but she didn't have to alter or falsify any official work document to do so. Once again, management makes a accusation that it cannot substantiate.

Nurse Peninsula was also charged with "willful and overt disregard of WASH policies, procedures and regulations." Referring to Section C Item 7 of the Handbook a serious offense is considered "Acts of willful and overt disregard of WASH **clinical** or **administrative** policies or procedures or disclosure of confidential information." The unilaterally promulgated rules and regulations in the Professional Staff Handbook do not address violations specifically related the actions of the grievant. The only clearly established procedure regarding the CAR-WASH facility is that "numbered parking stickers are available for a fee on a first-come, first served basis." The employee was in no way informed or forewarned, either orally or in writing, of the consequences of parking in the facility in an unauthorized manner. Therefore, she couldn't have an overt or willing disregard for a rule that doesn't exist.

For the most part, the letter of reprimand given to Nurse Peninsula was based on several false accusations, all of which are far from the realm of "serious offenses", and none of which are substantiated by factual evidence. Therefore, the letter should be expunged from the grievant's record.

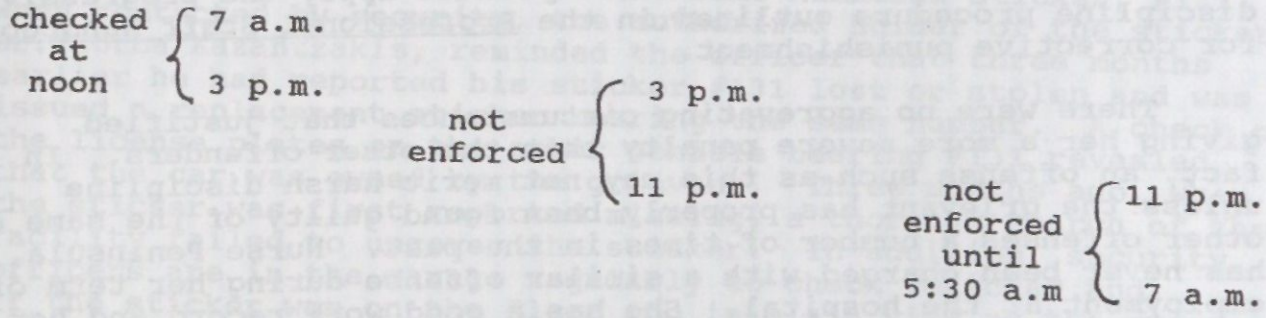
The union will also show that the three-day suspension was given without just cause, a blatant violation of Management's responsibilities as outlined in the Professional Staff Handbook.

As stated previously, Delmarva Peninsula was never warned of the consequences of her conduct. There was never an oral or written warning given during the time of the incident, at the time of the investigatory interview, or as part of the staff handbook that would have deterred the grievant from parking in

the garage. And in this case, since the grievant used the facility without being questioned for a period of 2-3 weeks, she had sufficient reason to believe that her conduct was not punishable.

Mr. Otto Freund-Mensch conducted his investigatory interview with the preconceived notion that the grievant *stole* the parking sticker, even though the grievant testified that she *found* it. The fact that she had to tell him at least twice shows that he doubted her truthfulness. Freund-Mensch obtained no substaintial evidence that the grievant was guilty as charged. In fact, the little evidence he did gather from the grievant proved the contrary. Had he conducted a fair and objective interview, Freund-Mensch would have discovered that inconsistent monitoring of the parking garage is where the problem really lies.

To begin with, the garage attendant goes off duty at 3:00 p.m., and, in practice, parking regulations are not enforced from that time until 5:30 a.m. the next morning. Hospital security routinely sweep checks the garage for stickers at least once a day before noon. Nurse Peninsula works the 7-3 and 3-11 shifts, rotating shift assignments every 2 weeks. On or about December 1 when the grievant found the sticker, she may have been on the 3-11 shift. Consider the following diagram.



This schedule leaves approximately 14 1/2 hours per day that parking stickers are not checked. Conceivably, for two weeks while the grievant was on the 3-11 shift, she could have gained access to the garage and parked her car there without ever being checked. Further, the undisputed fact that parking regulations are not enforced from 3 p.m. until 5:30 a.m. misleads the employees that its "o.k." to park in the garage during that time. More regular enforcement of the parking facility might eliminate this problem in the future.

Hospital security was also negligent in its investigation of sticker #131 reported lost by Dr. Kazantzakis three months earlier. If security is actually in the building every day at least once, then why weren't *they* the ones to find the sticker? A thorough check of the garage floor at the time of the report may have also eliminated this problem. But instead, the problem was compounded by the fact that security issued Dr. Kazantzakis

another sticker bearing the same number, making it impossible for the garage attendant to recognize the #131 sticker on Nurse Peninsula's car as the one reported lost or stolen.

Delmarva Peninsula is an honest and loyal employee of West Atlantic Shores Hospital who fell victim to the temptation of an empty parking space. Who among us has not tried in vain to find a parking spot within walking distance of this hospital? In fact, on two prior occasions during her first year of employment, Nurse Peninsula reported late for work--quite possibly because she was unable to find a parking space near the hospital on those days.

Nurse Peninsula is not the only employee who has had this problem, however. In the past three years, two other bargaining unit employees have been disciplined for unauthorized use of the parking garage. They may have parked there 1 day or three months before they were caught. Regardless, the violations were the same, but the discipline was much less severe. Dick Kildare was given a written warning for his first offense; Benjamin Casey was given a written warning for his first offense and a letter of reprimand without pay for his second. On her first offense, Delmarva Peninsula was given a severe letter of reprimand *and* a three-day suspension without pay, which proves that management acted inconsistently and arbitrarily when disciplining the grievant. Management should have opted to apply the progressive discipline procedure outlined in the Professional Staff Handbook for corrective punishishment.

There were no aggrevating circumstances that justified giving her a more severe penalty than the other offenders. In fact, an offense such as this may not merit harsh discipline unless the grievant has properly been found guilty of the same or other offenses a number of times in the past. Nurse Peninsula has never been charged with a similar offense during her term of employment at the hospital. She has a good work record and her personnel file includes only two oral warnings for coming in late. Both warnings were given over two years ago. For these reasons, the union believes that management failed to consider her work record and they acted in a discriminatory manner when administering discipline to the grievant.

The union's thorough investigation of this case fails to produce substantial factual evidence that confirms the grievant was disciplined for just cause.

III - B. Employer Theory of the Case

Management contends that it acted within its rights to suspend Delmarva Peninsula for unauthorized use of a CAR-WASH parking sticker. The discipline was for just cause.

West Atlantic Shores Hospital is located in center city,

Dover Deleware. The hospital employs approximately 1450 persons. Since parking seemed to be a relevant complaint of our employees, the hospital converted three levels of the physical plant into a parking ramp. The parking ramp created quite a demand among our employees, and we wish we could provide more parking space but at the present time it just isn't possible.

WASH procedures clearly communicate that spaces in the ramp are available on a first come, first served basis. Those that are issued a sticker have the privilege of parking in the facility for one year at the very reasonable rate of $48 per month. Other garages in the area charge up to twice as much for parking, or $950 annually.

In order to park in the garage, the employee must first insert his or her plastic hospital identification card in the card device at the garage entrance. Just inside the garage is a security office with a large window from which a garage attendant checks incoming cars to make sure they display the CAR-WASH sticker on their rearview mirror. In addition, hosipital security personnel regularly check the facility for unauthorized vehicles.

On December 21, 1991, a routine check of the CAR-WASH facility by hospital security personnel revealed that two cars were parked in the garage with the same numbered sticker, #131. When contacted by security, the authorized holder of the sticker, Dr. Zorba Kazantzakis, reminded the officer that three months earlier he had reported his sticker #131 lost or stolen and was issued a replacement sticker bearing the same number. A check of the license plates on the other vehicle bearing #131 revealed that the car was owned by the grievant. Three months ago, when the sticker was first reported missing, a thorough search of the facility failed to uncover the sticker. In addition, security officers are in the garage regularly to check vehicles and if the sticker was on the floor and in plain view as the grievant claimed, our own security personnel would have found it first. This leads us to one of two possibilities: Either the grievant did actually steal the sticker, as reported by Dr. Kazantzakis, *or* she found it shortly after it was lost, and, therefore, has been using it longer than she admits.

The next day, December 22, the grievant was called into the office of Otto Freund-Mensch, WASH Personnel Director. Peninsula arrived in his office accompanied by her union steward, Polly Mendicant. When confronted with the evidence, the grievant denied stealing the sticker and insisted that she found it on the CAR-WASH floor. Freund-Mensch took note of her remarks and then dismissed Peninsula and Mendicant from the meeting.

At the conclusion of a two day investigation, Freund-Mensch called the grievant and her steward into his office to inform the grievant that she was being suspended without pay for three days and was being given a letter of reprimand. The letter explained

that the grievant was guilty of a number of serious offenses, including: 1) dishonesty, 2) theft of property, 3) theft of services, 4) self-help, 5) falsification of work records, and 6) willful and overt disregard of WASH policies, procedures and regulations. In addition, the grievant's conduct violated the Code of Responsibility for Nurses and the responsibilities of a licensed professional practicioner.

The grievant, Delmarva Peninsula has been employed by WASH for 3 years, and evidently commutes to work. Management believes that any employee who has commuted to work for 3 years would be aware of the CAR-WASH garage operated by the hospital. While there is no evidence that the grievant has ever applied for a parking sticker or placed her name on the waiting list, she did receive a copy of the Professional Staff Handbook, which outlines the procedures for securing a space in the parking facility. Even if the grievant didn't read the handbook, as a commuter who has entered the parking facility on a number of occasions, she should be expected to know already that her conduct was punishable, especially by the fact that she needed a sticker to enter the garage and a garage attendant checks each vehicle for the sticker when entering.

Because of the limited number of parking spaces available at the CAR-WASH, certain rules and procedures are necessary to manage the facility in an orderly and efficient manner. If no policy existed whereby parking stickers are issued on a yearly basis, a major traffic jam would occur every single day when 700+ cars are rushing to get into 231 parking spaces. Some type of control is needed, at that is why the system was established, and that is why the garage is continuously monitored by a garage attendant and hospital security personnel.

Management conducted a fair and objective investigation prior to administering discipline to the grievant. Ms. Peninsula was given the chance the explain her actions before her union steward and the personnel director, but failed to offer a legitimate reason for not returning the lost sticker to security personnel. Instead, she proved her guilt by admitting to keeping *and* using the sticker to her benefit for a period of 2-4 weeks. The cash equivalence of this theft of service is approximately $48. This may seem like a negligible amount to the union and the grievant, but $48 could buy the hospital 81 computer disks, or 25 bottles of aspirin, or two cases of Xerox paper, or 200 syringes. When converted into more tangible items, the amount is much more appreciable, and the offense seems much more severe. Regardless of the amount, theft is dishonest, it is unlawful, and no offender must go unpunished.

In the past three years, three bargaining unit employees have been discharged for for dishonesty: one for falsifying work records and another for altering time sheets to claim payment for work not done; the third, a WASH safety officer, was discharged for overlooking safety rule violations. Also in the past three

years, three bargaining unit employees were suspended for dishonesty, and three were disciplined for incidents related to the parking garage. There was no evidence that these three employees used the parking garage for the extended period that Delmarva Peninsula did, so they were only given written warnings and letters of reprimand. These incidents prove that management applies its discipline even-handedly and without discrimination. Employees must know that their rule violations, especially dishonesty and theft of services, will not be tolerated.

Ms. Peninsula not only violated WASH policies and procedures but she also disregarded the Nurses Code of Ethics when she dishonestly engaged in self help by using the WASH sticker as her own and parking in the garage rather than turn the sticker in to officials. This one situation constituted a number of offenses that are inappropriate for a WASH employee.

Therefore, under written disciplinary policies and in light of previous similar offenses, management could have *discharged* the employee for these major offenses. However, in consideration of her three-year service and good employment record, the hospital reduced the penalty to a three day suspension.

IV-A. Union BATNA: What Must We Prove to Win?

The union's case depends on its ability to prove Management suspended the grievant without just cause.

The outcome will depend on whether or not the arbitrator perceives unauthorized use of the parking facility as a violation of the policies established in the Professional Staff Handbook and the Collective Bargaining Agreement. Management will probably argue that 1) CAR-WASH is owned and operated by the hospital, 2) it has the right to determine the methods and means of operation of the CAR-WASH facility 3) it is a benefit for which employees must pay for, 4) an established procedure has been established for securing and paying for the sticker, and 5) using a sticker that someone else has paid for to park there is something that the grievant should have known she could be published for.

On the other hand, the union has built a strong case in its defense against management, which were expounded upon in the union's theory of the case. They include:

1) Unsubstantiated and false accusations made by management in the letter of reprimand. The arbitrator will probably give credence to each accusation at his discretion. Three of the six are in a gray area--dishonesty, self help, and theft of services.

2) The investigatory procedure was neither fair nor objective. The success of this argument depends on whether or not the arbitrator believes the Personnel Director's "righteous

indignation" actually hindered his investigation.

3) Inconsistent enforcement of parking regulations. No doubt the arbitrator will side with the union when he considers how lax the enforcement of the parking garage is. He may even go so far as to conclude that management contributed to the situation because of its negligence.

4) Inconsistent discpline of CAR-WASH offenders. The arbitrator can easily be persuaded that the grievant's discipline was arbitrary. Two other offenders with similar violations received written warnings on their first offense. No aggrevating circumstances warranted otherwise in the grievant's case.

The arbitrator will also weigh heavily the fact that the grievant had a good work record and she had no oral or written forewarning of the consequences of her actions.

In conclusion, it may be hard for the union to counter management's argument that the grievant willfully used the parking garage for a period of two to three weeks without paying a fee. But since the damage amounted to only about $36, the union may be able to convince the arbitrator that the damage was minimal and didn't warrant such harsh discipline.

The union will probably be successful in persuading the arbitrator to remove the slanderous letter of reprimand from the grievant's personnel file, but it will have a hard time overthrowing the three-day suspension. It may, however, be able to reduce the the suspension to one day.

IV - B. Employer BATNA: What Must We Prove to Win?

Management's case depends upon proving that it had just cause for suspending Delamarva Peninsula. Management wants to prove that her conduct was not only a violation of the Collective Bargaining Agreement and the Professional Staff Handbook, but also the Nurses Code of Ethics.

The Handbook is clear as to which offenses are considered serious, but the arbitrator must determine whether or not the grievant's actions were actually violations of these rules and warranted a three-day suspension. Had this been a discharge case, the arbitrator would likely overturn the discharge, but management was lenient in administering discipline in this case, and the arbiter should recognize that.

Management must prove that the policies outlined in the Handbook are clearly communicated. Insufficient evidence was provided that could determine it was, and management must rely on the arbitrator viewing this infraction as one in which the employee would know was inappropriate and punishable.

Management should look further into the fact that the parking rules are inconsistently enforced. The arbitrator will no doubt weigh that fact very heavily. We suppose it is possible that since the grievant parked there for up to four weeks without being questioned that she assumed she was doing nothing wrong. The arbitrator may very well sympathesize with the grievant in this case. On the other hand, the arbiter may see it as a strong case of theft of services, and even though it is not exressly included in the Handbook, it would certainly lie within the realm of a serious offense.

Management should have no difficult proving that Ms. Peninsula engage in self help, but that argument, on its own, may not carry much weight.

The arbiter must ultimately rely on the Contract for his decision, and if he feels nothing contained in either it or the Handbook specifically addresses this issue, he may overturn the discipline.

All things considered, management has a pretty good chance of winning the case since the punishment was appropriate and for just cause.

V. Possible BATNA Tactics

Union

If the union can't persuade management to resolve this grievance prior to arbitration, it could gather information on management personnel who have in any way used a service of the hospital without paying for it, i.e. telephone calls, xeroxing income tax returns, bring paper home for personal typing, etc. This information could then be published and distributed to all WASH management personnel and posted on all union bulletin boards.

The union could also have flyers printed:

> *"Overparking at this meter is a serious offense according to management, and you may be subject to discharge or a three day suspension without warning for this violation. Please deposit 5 cents before you get fired."*

Union members would then put these flyers on the windshield of every car in the area that has overparked at a meter.

Another tactic the union could use is to volunteer to monitor the parking garage during the unenforced hours for unauthorized vehicles belonging to management personnel, and publicize such instances accordingly.

All of these tactics may make management realize that Nurse

Peninsula's offense was minor, and that even management employees are tempted by an empty parking spot.

Management

Managment doesn't want to upset labor-management relations any more than necessary, but it could report this incident to the state licensing agency and have Nurse Peninsula's license revoked.

Management could also decide to reserve the parking garage for physicians and patients only, or it could take away the parking facility altogether to eliminate the hassle. It could even circulate a memo to WASH security staff that the grievant has been dishonest and to watch her actions more closely in the future.

VI. Identifying and Articulating Interests

Union

The union has an obligation to see that the Collective Bargaining Agreement is properly enforced, and that unilateral rules and regulations are adequately communicated and consistently enforced. If an employee has been disciplined without just cause, the union has the duty to fairly represent the employee in her case against management.

The union is also concerned about maintaining a healthy labor-management relationship, especially at a health care facility where the nurses, staff, and professionals are constantly under public scrutiny. A poor public image may deter patients from seeking care at the hospital.

And finally, the union wants to continue having the privilege of a parking facility. It is a benefit that it greatly appreciated, even if only a few can enjoy it. It may cause problems at times, but there would be more problems without it, and the union wants to keep violations to a minimum.

Management

Management is interested in maintaining its right to establish policies and procedures, direct the work force and conduct hospital operations in an efficient and responsible manner. It must also be careful not to discipline employees without just cause in an effort to avoid costly arbitration proceedings. But on the other hand, it wants to be able retain the right to discipline its employees whenever appropriate.

Management is also concerned about keeping labor-management relations intact. A strike by hospital employees would disrupt patient care and hinder the public's possitive image of West

Atlantic Shores Hospital.

WASH is also interested in operating the CAR-WASH facility fairly and efficiently, with all due respect to the 625+ employees that are on the waiting list. The parking garage is an important privilege for WASH employees and the hospital recognizes their frustrations.

VII. Shared Interests

Both the union and management want to maintain a positive public image. Any disention between labor and management could have a severe impact on patient care. Since the people of Dover can just as easily go to another hospital in the area, it is important to keep grievances from reaching the public through arbitration.

Both the employees and management are interested in the sanctity of the employment relationship in the health care industry. Nurses are needed everywhere--the union knows it and management knows it. Nurses are the one type of professional that can leave one hospital one day and be working at another the next day. The union doesn't want to loose them as dues-paying members, and management doesn't want to loose them as employees.

VIII. Prospective Acceptable Settlements

Union

Even though it feels it has a strong case, in order to avoid arbitration the union would be willing to accept a written warning into the grievant's personnel file in lieu of the severe letter of reprimand. It will also accept a one-day suspension for theft of services, but demands that the grievant be made whole for a least two of the three days.

Management

Management would be willing to expunge the letter of reprimand from the grievant's file and replace it with a written warning if the grievant agrees to make restitution in the amount of $48 for the 3-4 weeks' use of the parking garage. In view of the discipline given to other parking violators, management will reduce the suspension to one day, but not less, due to the extended period of time the grievant admitted to using the sticker.

Donald S. McPherson (c) 1994
University Professor of Industrial Relations
Indiana University of Pennsylvania

SNOWBOUND

Les Neiges, Isabelle Berg, Ava Lanche, Sol Stace, and Imogene Plowman are Maintenance Employees of the Hiverdale Housing Authority. For the two week pay periods February 28-March 13 and March 14-27, they were scheduled to work their normal 8:00-4:30, Mon-Fri shifts.

A major blizzard hit the region at the end of the week of March 7. The employees were asked to work 4.5 hours overtime on Saturday, March 13, and 6 hours overtime on Sunday, March 14, in snow emergency conditions clearing snow from drive ways, building accesses, parking lots and fire hydrants. When they received their pay for this period, the pay stub showed compensation for 10.5 hours at time and one-half for overtime work. They immediately sought out their union steward, Gustav Todien, who agreed that they should have been paid double time for the work on Sunday, March 14, and went with them to the Maintenance Supervisor, Diana Rector.

But Rector responded that the Authority has the right to schedule work and the Agreement defines the work week as beginning at 12:01 Sunday. The amount owed for overtime cannot properly be computed until the end of any given work week and the employees were properly paid time and one-half for the hours worked each week in excess of 40 hours. Todien said the union would be filing a grievance.

ADDITIONAL UNDISPUTED FACTS

The pertinent contract language has remained unchanged for 12 years and there has been no previous grievance filed on the issue. No one can remember a prior instance of Monday-Friday employees being asked to work both Saturday and Sunday overtime. The calendar and schedule worked by the Grievants was:

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
FEB 21	22	23	24	25	26	27
X	R	R	R	R	R	X
SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
28	MAR 1	2	3	4	5	6
X	R	R	R	R	R	X
SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
7	8	9	10	11	12	13
X	R	R	R	R	R	OT-4.5hr
SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
14	15	16	17	18	19	20
OT-6hr	R	R	R	R	R	X

R = Regular Shift 8-4:30 OT = Overtime Hrs X = Regular Day Off

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE NO. 5 - WORK WEEK AND WORK HOURS

A. The regular work week for all employees covered by this agreement shall consist of five eight hour days where such schedule is possible. A regular work day shall consist of eight consecutive hours of work exclusive of a one-half hour unpaid lunch period. A split shift shall not be permitted at any time. The Employer retains the sole and exclusive right to schedule and direct the work force providing that it may not exercise such right in violation of any provision of this Agreement.

B. Time and one-half will be paid for all hours worked in excess of eight hours in any work day or forty hours in any work week. Time and one-half will be paid for all work on the sixth consecutive work day for an employee. Double time will be paid for all work on the seventh consecutive work day for an employee. There will be no pyramiding of overtime payments under this Agreement.

C. The work week shall start 12:01 A.M. Sunday and shall end the following Saturday Midnight. A regular work week schedule shall be posted for all employees.

D. No employee shall be justified or warranted without valid reason to refuse to work overtime on any day when the necessity for doing such overtime work arises because the job must be finished that day or because of any emergency that reasonably necessitates the doing of such overtime work.

Todd Stiles

LR 641
2/17/94

SNOWBOUND

Name of Grievants: Les Neiges, Isabelle Berg, Ava Lanche, Sol Stace, and Imogene Plowman.

Date of Grievance: March 30th, 1993.

Contract Provisions Cited: Article No. 5 Section B and all other relevant contractual provisions.

1. Statement of Grievance:

On Sunday, March 14th 1993, Maintenance Employees Les Neiges, Isabelle Berg, Ava Lanche, Sol Stace and Imogene Plowman worked 6 hours each as directed by the Hiverdale Housing Authority. Despite March 14th being the seventh consecutive work day for these employees, they were each compensated at time and one-half for the 6 hours worked in direct violation of Article #5 Section B of the current Labor Agreement concerning double time.

Relief Sought:

In accordance with Article #5 Section B of the current Labor Agreement, the Union request that the Grievants be immediately paid 6 hours each at one-half times their regular rate for work completed on March 14th,

1993.

2. Management's Negative Response:

Since the work week is the standard for controlling hours of work under Article #5 of the current Labor Agreement, overtime, to be paid properly, must be computed at the end of a given work week. Since Sunday, March 14th began a new work week as defined in Article #5 Section C of the contract, the 6 hours worked by the Grievants on March 14th were properly paid at time and one-half. Grievance Denied.

3. Theories of the Case:

Union:

Due to a severe Winter storm hitting the area near the end of the week of March 7th, Maintenance employees Les Neiges, Isabelle Berg, Ava Lanche, Sol Stace and Imogene Plowman were directed by the Housing Authority to work emergency snow removal on Saturday March 13th and Sunday March 14th. Since all of these employees completed their regular Monday through Friday shifts that week, March 13th would have been the sixth consecutive workday, and March 14th would have been the seventh consecutive workday for these employees.

When the employees received their monthly pay checks, they immediately consulted their steward Gustav Todiem complaining that they were paid time and one-half for the 6 hours worked on March 14th. Article #5 Section B of the contract clearly reads that "Double time will be paid for all work on the seventh consecutive workday for an employee".

Being in agreement with the employees, Mr. Todien immediately attempted to have the mistake corrected by the Maintenance Supervisor Diana Rector. To his dismay, Mrs. Rector would not correct the mistake claiming that management had the right to schedule work, and overtime must be computed at the end of the work week which is defined under Article #5 Section C of the contract. Since the hours worked on March

14th fell in a new work week under the contract, the overtime was computed correctly. Mr Todien did not agree with this interpretive addition to the contract language and proceeded with the grievance.

The Union contends in this grievance that due to several inherent factors incorporated in the language of Article #5, the work week as defined in Section C is not the over riding factor determining how these employees should be paid for their emergency work on March 14th. The Authority has made an error by implying the double time language in Section B is restricted by the defined work week.

The first factor presented by the Union concerns the overall wording of Article #5. The wording of this article specifically defines the terms and situations governing hours of work, overtime, and management's right to enforce overtime. When reading these detailed descriptions of the regular work week and regular workday in Section A, overtime procedures in Section B (detailing that any hours over 40 in a work week will be paid at time and one-half), the formal work week in Section C, and management's enforcement power in Section D, little is left for individual interpretation. Considering that the Union in prior negotiations has agreed to this specific language, inserting physically or interpretatively the phase, in a work week, to the double time language

of Section B would have been done without Union knowledge and approval. Adding this phrase drastically and incorrectly changes the meaning of the double time language. This language reads "Double Time will be paid for all work on the seventh consecutive workday for an employee." This is the way the language is printed and should be interpreted. Since March 14th was the seventh consecutive workday for the Grievants, they should be paid double-time for their work.

The second factor presented by the Union is the secheduling power the Authority enjoys under Article #5. The Authority has the ability as defined in Section A to effectively rotate the employee's regular 5 day schedules throughout the week to eliminate the payment of overtime on days considered premium in other employment sectors. Considering that in the twelve years of this present language no one can remember Monday through Friday employees being asked to work both Saturday and Sunday, the Authority has been very successful in eliminating overtime payments under the present language. By adding the phrase <u>in a work week</u> to Section B, the Authority, through alternating weekly schedules, could further restrict overtime payments by eliminating both time and one-half and double-time for six and seven consecutive days. The present double-time time language is needed to balance the contractually agreed upon scheduling power

defined in Section A. The Authority received the power to freely schedule while the Union received the right to be paid for scheduling indiscretions.

In continuing the language review, the Authority is already protected from overtime abuse under the present language in Section B prohibiting the pyramiding of overtime payments. When interpreting the double time language as it is written, the Authority is already protected from being forced to pay on both ends.

Finally, under section D, the Authority has the ability to force employees into overtime unless they have a valid reason. Considering a general Union policy of obeying resonable orders and grieving later, the Authority can be assured of filling staffing requirements. The present double-time laguage permits the employee to collect premium pay in exchange for being forced to work on premium time. Granted, this situation was considered essential to promoting the safety of the tenants, but in this type of an emergency, the employees may have personal responsibilities. By setting a side their responsibilities, personal damages may occur. These employees should be properly compensated for work above and beyond their regular achedule. Their compensation is detailed in Article #5 Section B.

Considering these factors, the Union must protect the interest of its members by forcing the Authority to follow written contractual responsibilities, not their interpretations of responsibilities. The Union must be fair to all employees. By accepting the Authority's work week theory, ermployees not scheduled to work the beginning of a week will have reduced opportunities for overtime pay. The Union agreed to the language in Article #5 by justifying the double-time language as a balance. The Union also agreed to limit scheduling restrictions in exchange for the right to premium pay. These employees worked seven consecutive days, and should be paid double-time for the hours worked on the seventh day regardless of what work week it fell in.

Management:

The Authority's payment of 6 hours at time and one-half for work completed on March 14th by Les Neiges, Isabelle Berg, Ava Lanche, Sol Stace, and Imogene Plowman is correct. The Authority agrees with the Union that these employees were directed to work emergency overtime on March 13th and March 14th. The Authority also agrees that March 14th was the seventh consecutive work day for these employees, and the language in Article #5 Section B states that "Double time will be paid for all work on the seventh consecutive work day for an employee". Despite these facts, the Authority disagrees with the Union that these employees are entitled to double time for Sunday March 14th. Due to the contractual definition of the work week they were paid properly.

Article #5 section C defines the work week as starting at 12:01 a.m. Sunday and ending the following Saturday at Midnight. Although March 14th, was the seventh consecutive day these employees worked, this day fell in a new work week. You cannot disregard the application of the work week when computing overtime or any hours. The work week is clearly defined in the contract and should be logically applied in all sections.

Although the double time language in Section B does not include the words seven consecutive days

in any work week, this section begins by stating that "Time and one-half will be paid for all hours worked in excess of eight hours in any work day or forty hours in any work week". The tone of this section is established immediately. Overtime will be administered in accordance with the work week. It is not strenching the interpretation of this language to consider the wording starting the section be applied throughout the section. Using the work week through out this section follows a logical direction.

A second point substantiating this logical progression concerns the ending point of these consecutive days. Section B provides for premium pay on the six and seventh consecutive days and stops there. What about the eigth, nineth, tenth consecutive day? If this language was attempting to progressively increase pay for consecutive days in an infinite period, it wouldn't stop at seven. The eighth day would be worth more, the ninth day would be worth more and etc... This language doesn't adress an infinite period. It addresses seven consecutive days which constitutes a defined work week.

If the double time language in this section was intended to be an exception to the confines of a work week, it would have been noted as such and approved by the Authority. Overtime is a critical issue in any sector, and is not brushed over lightly in

negotiations. Considering the wording and overall context of Article #5, interpreting the present double time language separate from the work week would have knowingly been approved by the Authority. It was not.

Given this was an emergency situation dictating that these employees were required to work beyond their regular schedule, they were entitled to premium pay. Since all five employees worked March 14th, the beginning of the work week, then worked their regular 40 hour shift that week, each was entitled to 6 hours at time and one-half for the hours they worked in excess of 40 hours. Each employee was paid in accordance with Article #5 Section B of the contract.

4. BATNA ANALYSIS (Can we win in Arbitration)

Union:

Since the record shows the Sunday, March 14th was the seventh consecutive work day for each employee and Article #5 Section B states that "Double Time will be paid for all work on the seventh consecutive work day for an employee". The Union must prove that March 14th should stand alone and be paid in acordance with the language regardless of where it was located in a work week. To do this, the Union must prove that this language is clearly written, and must be administered as such without interpretive additions.

The essence of this arguement depends on how much strength the arbitrator will place on this written language. Even though the Union's arguements on the context of the article, the relationships of the sections, and its knowledge when approving this language are debatably persuasive, the Union's strength lies in the fact that it is attempting to prove the accuracy of this language as it is written. It is not attempting to provide any interpretive additions. This point is critical to this case, and one in which the Union has centered its arguements.

Although the Authority's arguement is logically sound, it is attempting to add an interpretive addition to this language. For this reason, the Union has

an advantage, a slight one, but never the less an advantage.

This situation being an emergency, and one in which forcing these employees to work may have caused personal delays, may some what play on the sympathy of an arbitrator. Remember though, these employees were already paid premium wages at time and one-half. The Union must remember that although they are arguing language in this case, it is only asking for the employees to be properly paid. This is what the arbitrator will rule on.

Although the Union may have a slight advantage with this direct wording, it is by no means assured a favorable ruling. Its arguments are persuasive, but have not extremely tempered the Authority's argument. It has provided an arbitrator the ability to rule in its favor simply by stressing the reasoning and purpose of the language, but this case can go either way.

Considering the present facts, and the interest of all Union members, it can not accept a settlement less than recovering full payment for the employees.

Pay and overtime procedures are of grave interest to any Union. These are a foundation of the organizing movement. Members want fair compensation for fair work. This is a case that should be taken to arbitration if necessary.

Management:

The Authority's argument in this grievance is logical and sound, but they have the uphill battle of attempting to persuade the arbitrator that written, agreed upon language must be qualified with an interpretive addition. When combining the Union's arguements stressing the reasoning for this language, and the specific wording ot the language, the Authority is by no means assured a favorable ruling.

Although the Union has provided the arbitrator the ability to rule in its favor, the Authority's arguement is persuasive. Its dissection of Section B emphasizing the tone of the language set by the first sentence, and the discussion on infinite and finite periods has not been directly refuted by the Union's arguement. There is a chance an arbitrtor will rule in their favor. As mentioned above, they may be slightly disadvantaged but a favorable ruling is not out of the question.

Again, the authority must also remember that although language is being argued,the Union is asking for the employees to be paid properly. Realilizing that this was an emergency situation, and it can force these employees to work, an arbitrator may consider this his decision. This is presumed to be first time this situation has occurred in 12 years.

When considering both arguements, the uncertainty of a favorable ruling, the cost of paying the employees versus the cost of arbitiration, the low occurance rate of this type of situation, the Authority's ability to schedule around overtime, a settlement should be considered. The Union is very determined in this case and may present availability problems in future emergencies. The safety of the tenants ultimately rest on the Authority's shoulder. Since this isn't a regular occurance, it may be wise for the Authority to settle this grievance without precedence and attempt to correct this interpretive discrepancy in the next negotiations.

5. BATNA TACTICS

Union:

If the Union cannot resolve this grievance early in the process, it has some tactics that may persuade the Authority to change it's mind. In subtle terms, the Union may suggest that if overtime is not paid properly, future availability of employees may diminish. Although a valid reason is necessary to refuse overtime, valid reason are not extremely difficult to substantiate and argue. Safety is the responsibility of the Authority. The Authority will be blamed and sued if a accident occurs.

Considering the Housing Authority tenants are typically blue-collar or less, the Union may start a campaign to inform the tenants of this situation and the furture ramifications. These tenants will probably side with the workers in questioning the Authority's tactics. Any agency even remotely associated with the government will be highly scrutinized if safety measures are not maintained. Just being placed in the spotlight can mean extensive red tape and extra work for Authority management.

Management:

The Authority could explin to the Union that due to the added costs of paying overtime, it may be economically prudent to contract out snow removal in emergency or regular situations. Although this would normally be a negotiable item, it will cause the employees to balance their jobs against added premium pay. If subcontracting starts with snow removal, where will it end? This can be used as a tactic to make employees think.

6. IDENTIFYING AND ARTICULATING INTERESTS:

Union:

The Union wants to protect the memmber's rights to receive premium pay for work on premium time as both parties have contractually agreed. Pay issues are of extreme interest to all Unions. Organizing efforts use the fair pay premise as a building foundation. To ensure member confidence in Union procedure and fair representation, wage and compensation grievances must be vigorously persued.

Management:

The Authority wants to ensure that emergency staffing needs are met to adequately maintain public safety while keeping operation costs to a minimum. It feels this can be achieved by paying overtime at the contractually agreed upon rate. Typical housing authorities operate on a budget that must be adhered to. They need to balance this budget while keeping good union relations to ensure this proper operation. By operating within budget, keeping tenatns satisfied, and keeping employees satisfied, the Authority can maintain a good public image.

7. SHARED INTERESTS

Both the Authority and Union want to maintain good relations. By trusting and working with each other, both sides can achieve their goals. The Authority can properly and safely maintain their housing, keeping the public satisfied, while the Union can ensure acceptable wages, hours, and terms of employment keeping its members satisfied. In these times, public agencies and workers are not seen in a good light. Cooperation is needed by both parties to change this opinion. A smooth operation will make all parties satisfied.

8. SPECIFYING PROSPECTIVE ACCEPTABLE SETTLEMENTS:

Union:

Because of the arguements presented and the conflict issue, the Union can accept nothing less than full payment for these employees. If need be, arbitration should be pursued.

Management:

As opposed to arbitration the Authority will be willing to grant the Union's request, emphasizing that this decision sets no precedence, the Authority will then attempt to clarify this language in the next contract negotiations or earlier if circumstances dictate.

Todd Stiles

LR 641

2/17/94

CASE LOG

Snowbound

I was not initially excited about this case. After reading the details, I felt the case was mundane, and one without much argument for either side. Little did I realize that this would pose a major block in completion of the theories. This case was going to require some creative thinking. Thinking that I was programmed not to do in my prior Labor Relations employment. I immediately looked at this case as union's attempt to cause unnecessary trouble, and proceeded to take a position as I have done many times before.

As I started to prepare the union's theory, which I completed first, I had a very difficult time developing a rational argument other than this is what the language says. After rewriting this theory three times searching and grasping for ideas and clues, I decided to look at the Batna analysis for some guidance. If I could determine what must be proven to win this case, then I should be able to develop a theory backwards from that point.

While attempting the analysis, I realized that the union's theory need not be complicated. The language is specific, and agreed upon. This was the union's case. From that point in the thinking process I started to look at the case information in a simpler nature. Instead of scouring the details for that little loop hole necessary to blow the other sides case out of the water, I began looking at the overall picture of what this language means to both union and management, and what accepting each sides interpretation would mean to the other side. By using this rationale I started developing a better thought process. Whether you will think the theories or the rationale behind them is adequate, this is a new way of thinking for me. I was trained to think only in terms of the side I was representing, and to forget the other sides interest. They would worry about that.

After completing the union's theory, I attempted to complete the rest of the sections for the union. This method didn't work. I was continually thinking about the management issues while trying to develop union strategy. Since this was blocking my thinking, I decided to work union-management one part of the case at a time. This method seemed to work best for me. My ideas developed quicker and were more rational.

When completing management's theory, the side I had taken in my employment for the last 5 years, I had difficulty organizing my thoughts into cohesive theory. In my thinking, the work week has to be the basis for all computations, but how was I going to express this with the information available?

After spending 5 hours of writing nothing I decided to walk away from the paper until the next day.

While shoveling snow the next morning, I began to pick up details in the language that would help build at least a better argument. By just letting the thinking process flow in an environment away form the library, ideas started to come together. From that point I tried to set time aside to mentally review the facts of the case before I put them on paper.

While completing the case, my attitude to both union and management changed several times. When finishing the union theory and analysis I surely thought it had the better case. When I finished the management's theory and analysis, I thought it had a better case. Through this back and forth rationale, I finally determined that because of the arguments presented, no one side had the sure winner. Both sides gave the arbitrator the ability to rule in their favor. Because of this thinking, how was I going to finish the rest of the case?

You must understand that in my previous employment, settlement had a negative connotation. There was always an underlying motive every time we settled a case. Because of this, a rational review of the facts was difficult. Reviewing the interests of both sides was strange to me. I always attempted to promote management's side, and always strived to obtain that goal.

When I came to the conclusions in this paper, I was surprised. This was extremely different and unsettling to me. I was actually considering factors such as union determination,

what is fair to the employees, and what will the public think of the final decision. These items rarely entered my decision making process in prior experiences. I can safely say now that this type of review could have resolved or diminished many conflicts that were strengthened by simple position taking.

Although my theories and conclusions may not be adequate to others, they are the best I could put forth, especially considering the thought process needed to complete these cases properly. This case was definitely ground breaking for me. I am anxious to see if the next case will be as difficult when I immediately use this interest based thinking to develop the arguments and conclusion.

In summary, I can safely say that this case was a trying experience. I feel an accomplishment in just finishing the case, but hope future cases will develop in a more orderly fashion. I wish I would have consulted other students on this case. They may have been able to help me develop better ideas and at a quicker pace. Although I did take a week to finish this case, I will surely spread out the next ones out. With each revision, new ideas arise that need addressed, and that takes time. This case was definitely a provoking learning experience. At times I though I was over my head even though I have handled grievances for years. I am very interested to see how you perceived my work.

Donald S. McPherson (c) 1994
University Professor of Industrial Relations
Indiana University of Pennsylvania

UNLUCKY STRIKE

United Public Utilities and the United Utility Workers Union Local 711 have had a collective bargaining relationship for 42 years. Fifteen years ago, the parties had a particularly bitter strike. Employees continued to work after expiration of the agreement in April until the Union began a work stoppage on June 1, which continued until October 13. In settlement of the strike, the parties executed a "Memorandum of Agreement" effective October 13, 1980, the terms of which comprised a new three year Agreement.

Grievant Bonnie Chance was an employee fifteen years ago at the time of the strike but was off on Workers' Compensation due to a work-related injury. She went on compensation three weeks prior to the beginning of the strike and did not return to work until two weeks after its conclusion. Last week, Chance decided to investigate an early retirement with a reduced pension.

When she sought information about the amount of her pension, she noticed that four months had been subtracted from her service credit and inquired. She was advised that no credit could be given for the period of the strike. When she disagreed, arguing that she was not on strike, she was also told that the matter was specifically covered in the strike settlement agreement negotiated with the Union and that, in any event, the Company would view any grievance over the matter as untimely.

Chance went immediately to the union local president, arguing that she should not be penalized four months in her pension calculation since she was on Workers' Compensation during the entire period of the strike and did not and could not participate in any of it. The Union agreed and filed a grievance.

ADDITIONAL UNDISPUTED FACTS

1. No employee who has retired since the strike has been given pension service credit for the four months of the work stoppage. The Union agrees that no credit should have been given and no grievances have been filed, nor has anyone sought to grieve.

2. No one has any information concerning whether other employees were on Workers' Compensation for all or part of the strike and whether any of them has retired since that time. If there have been any such employees, they did not attempt to file grievances through the Union concerning credit for any or all of the strike period.

3. During the strike, the Union advised all employees who were on any kind of leave not to participate in strike activities.

4. The union made no attempt to bar any bargaining unit member employee, regardless of active or leave status, from participating in ratification voting. The ratification vote was taken by mail. Chance does not recall whether she voted.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE II RECOGNITION

The Company recognizes the Union as the exclusive bargaining agency for the employees of the Company, covered by the Classified Rate Schedule incorporated in the Agreement.

ARTICLE V GRIEVANCE PROCEDURE

Section 1.

Any complaint arising out of the application of any provision of this Agreement or subsequent agreements shall be recognized as a grievance only if the Company receives the completed Union grievance form within thirty (30) calendar days from the time of the alleged occurrence, except grievances on job selection must be received within seven (7) calendar days after the selection. Grievances filed outside the time limits set forth above are deemed null and void and may not be further processed or refiled.

ARTICLE IX BENEFITS

The benefit plans for employees represented by the Union shall be governed solely by the provisions of the following negotiated Union Employee Benefit Plans:

Disability Benefit Plan, Long Term Disability Plan, . . . Pension Plan . . .. These plans are defined in this Agreement.

No changes affecting the benefits shall be made in these plans for employees represented by the Union unless by agreement between the Union and the Company.

ARTICLE LXI PENSION PLAN

Section 1. Definitions:

Whenever used in this Plan, the following terms will have the meanings as shown:

"Accrued Benefit" means the retirement benefit payable at age 65 which a Participant has earned under the Plan as of a specified date.

* * * * *

"Earnings" means the wage or salary paid to the Participant by the Employing Company, excluding bonuses and overtime payments, but including the following items:

* * * * *

(6) Workmen's compensation payments, excluding commuted payments;

* * * * *

"Pension Service" means the sum of service credited to the Participant under this Plan before attainment of age 65, except that periods of absence from employment in excess of 30 days which are not due to an authorized leave of absence under a military service policy or a Disability Plan of the Company shall not be counted.

* * * * *

Section 6. Amount of Pension Benefit in the Case of Retired Participants:

The amount of the pension in each case will first be calculated as though it is to commence at Normal Retirement Date. The basic amount so calculated will then be used to calculate the pension in case of early retirement.

(1) Career Average Formula

For each month of employment, while included in this Plan, pension credits will be accrued for each Participant month by month on the following formula:
1.7% of the Participant's Earnings; provided, however, that no Career Average pension will be accrued on account of any period in which the Participant is absent from work and receiving Earnings at less than the normal full rate.

(2) Alternate Formula

When a Participant is being retired, an alternate computation will be made . . . :

An amount equal to 1.125% of the Participant's Final Average Annual Earnings shall be multiplied by the number of years (including completed months as a fraction of a year) of the Participant's Pension Service up to his retirement date.

Section 13. Right of Change:

The Company reserves the right upon agreement with the Union to amend, modify, alter, suspend or terminate the Plan in whole or in part, but such action shall not have retroactive effect. In no case, however, shall any such action adversely affect Accrued Benefits.

OTHER PERTINENT AGREEMENTS

Memorandum of Agreement

Agreement was reached on a three-year contract settlement between the Company and the Union. The terms of the agreement are as follows:

1. A three year contract with wage increases of . . ..

2. Company agrees to grant amnesty to strikers in accordance with the conditions set forth during negotiations.

3. Company agrees to extend credit for all service during the work stoppage for all time in progression, seniority and all Benefit Plans with the exception of the Pension Plan. Credited service for pensions will commence on October 1.

* * * * *

Sean M. Bundas
Contract Administration

UNLUCKY STRIKE

1. Written Union Grievance

Name of the Grievant: Bonnie Chance

Date of the Grievance: April 1, 1994

Statement of the Grievance:

The Grievant, Bonnie Chance, is being improperly credited for her length of service with regard to the calculation of her pension benefits. Mrs. Chance is being denied credit for a four month period in 1980 in which the union was on strike. Since Mrs. Chance was on workman's compensation leave throughout the duration of the strike, and therefore could not and did not participate in any of the strike activities, she is entitled to full credit toward her pension account for these four months.

Relief Sought: The union requests that Bonnie Chance receive full pension service credit for the four months in which she was receiving worker's compensation.

2. Written Management Negative Response

Bonnie Chance is not entitled to pension credit for the four months in which the union was on strike pursuant to the terms and conditions of the Memorandum of Agreement that was

ratified by both the Company and the Union on October 13, 1980. This agreement clearly stated that pension service would not be accrued during the time of the work stoppage for all striking workers. Since Bonnie Chance was a member of the bargaining unit, she was subject to the actions of the union. The union was the exclusive bargaining agent for Mrs. Chance. Therefore, regardless of active participation, Mrs. Chance was effectively a party to the strike.

Furthermore, regardless of the merits of the case, this grievance is considered by the company to be untimely. The conditions of the Memorandum of Agreement were enacted fifteen years ago. Based of the clear language of the Memorandum of Agreement and the clear untimeliness of the grievance, the grievance is denied.

3. A. Union Theory of the Case

Underlying the relative complexities of this case, certain facts provide a basis for the fundamental logic of its interpretation. The question at hand is the nature of what constitutes a "striker". By its very definition, becoming a striker takes some course of action. A striker, at the very least, is someone who refuses to report to work as scheduled. But there are certainly more factors than just not reporting to work as scheduled that makes a particular person a striker. If this were the only criteria for being on strike then anyone who called in sick or didn't report to

work for whatever reason could be considered a striker. Obviously, this notion is silly. People who call in sick for work are not usually on strike. So there must be other elements that determine if a person is on strike or not. First. we must consider an employee's motive for not reporting to work. This is important. If an employee is involved in a concerted work stoppage along with other employees whose motive is to pressure the company into an agreement with certain terms and conditions, then we believe they have met the criteria for being termed a striker. A striker does not hide his identity or his motives. A striker engages in certain activities that promote the strike such as picketing. This is the very nature of a striker. Bonnie Chance was not a striker. She could not have been a striker even if she wanted to be. Throughout the entire duration of the strike, Mrs. Chance was on leave receiving worker's compensation for an injury that she had received while at work. Mrs. Chance's situation allowed her only one course of action. Mrs. Chance did exactly what she would have done had there been no strike. She participated in the strike in no way, shape or form. Mrs. Chance clearly does not meet the definition of a striker.

The company will most likely make the allegation that Mrs. Chance was a party to the strike because she was a bargaining unit member. The idea being that since she gave the union the power to represent her, she became a striker when the union called the strike. While it is true that the

union is the exclusive bargaining agent for its members, the decision to strike is still a personal choice for each individual member. This type of "guilt by association" that the company implies is unfounded. Mrs. Chance should not have to suffer the penalty for a strike that she had no way of taking part in. The fact is that Bonnie Chance should have not been considered a striker.

Another issue arises out of this argument. Since Mrs. Chance was not a striker, she was still accruing service time in a manner that was contractually legitimate throughout the duration of the strike. Under Article LXI the contract states that "pension service shall be credited to the participant...except that periods of absence from employment ...shall not be counted." Mrs. Chance was not absent from employment during the time that she was receiving worker's compensation. Her employment relationship with the company was still in effect. This means that had there not been a strike, Mrs. Chance would have received full credit for this time. The Memorandum of Agreement did not take place until the end of the four months in question. At this time, Mrs. Chance had already accrued the pension service for those four months. Subsequently, the Memorandum of Agreement retroactively affected Mrs. Chances's accrued pension service. This is a clear violation of Article LXI, Section 13 which states that no change, bilateral or otherwise, shall affect accrued benefits. Simply branding Mrs. Chance as a striker cannot nullify the fact that she accrued her pension

service during those four months in strict adherence to the contract language. To retroactively take this service away (which is exactly what the company did) would be a clear violation of contract language.

Finally, on the issue of timeliness, one certainly cannot be expected to grieve unless they are adversely affected. The issue of pension service calculations was not relevant to Mrs. Chance until she began contemplating retirement. Obviously, she could not grieve a situation that she was not aware of. Even if the company contends that Mrs. Chance should have raised her objections when the memorandum was drafted, it really doesn't matter because the implications of the agreement could not adversely affect her until the time of her retirement.

3.B. Management Theory of the Case

When employees join a union, they enter an agreement with that particular union. The nature of the agreement is that the union will become the exclusive bargaining agent for the employees that comprise the bargaining unit. The union acts on behalf of these employees as a whole. This relationship may bring about certain rewards for the employees yet it is not without its share of detractions. When employees elect to have a union represent them they are able to enjoy the rewards that collective bargaining affords them. On the other hand, certain conditions negotiated by the union may not be considered beneficial by each individual

union member. Unfortunately, for those who are displeased with the terms that their union negotiates they must accept this as being part of the collective bargaining relationship. This is not to say that unions are not democratic organizations, most in fact are. But as the old saying goes you can never please everyone.

The point here is that union members must accept the good with the bad. Union members cannot try to negotiate their own best deal with the company. By its very nature, and by the law, the bargaining must be collective.

This very fact has a significant bearing on the case of Bonnie Chance. Mrs Chance contends that since she was on worker's compensation she in effect could not participate in the strike. This may be true but it does not matter. What does matter is that Chance was a member of the bargaining unit that was called out on strike by the union that represented it. Her individual actions have absolutely no relevance here. As a member of the bargaining unit she was subject to the actions of the union who was her exclusive representative. To have it any other way would allow Mrs. Chance to negotiate on her own behalf. Union members cannot have it both ways. If they choose to have a union then they choose to abide collectively by the decisions of that union. Collectively they reap the benefits. (As Mrs. Chance enjoyed the benefits of the negotiated agreement). Collectively they must suffer the individual detriments that are part of any collective action.

The union may refer to the issue of retroactivity. The contract does state that in no case shall a change be made that retroactively affects accrued benefits. The union may contend that the Mrs. Chance had already accrued her pension service time prior to the Memorandum of Agreement that exempted strike time from pension service credit. The problem with this argument is that as a striker, Mrs. Chance was not eligible to accrue pension service in the first place. We have already established that Mrs. Chances's individual participation or lack thereof was irrelevant to her status as a bargaining unit member who by virtue of her union's decision was on strike.

The fact that Mrs. Chance was able to collect her state mandated worker's compensation payments throughout the duration of the strike does not make her eligible for pension service accrual. When a union chooses to call a strike, the company is not bound by the provisions of the expired contract but rather by the terms negotiated to resolve the strike. The omission of credited pension service for the strikers during the time of the strike was the negotiated settlement. Both the company and the union are bound by these agreed upon provisions.

It is important to note that the parties made no mention of employees out on leaves of any type when negotiating the settlement. Could the parties have included such language? Of course they could have. Worker's compensation is mentioned in the current jointly negotiated pension plan.

Was the union aware that certain employees were out on leave during the strike? Yes, the union told them not to participate in any strike activities. (Keep in mind this did not exempt them from the strike). Why didn't the union make an effort to expressly exclude these employees from the terms of the agreement. The reason really doesn't matter. The fact is that the parties knew about these employees and chose not to include language that specifically referred to them.

It is important to note the specific language of the Memorandum of Agreement.

> Company agrees to extend credit for all service during the work stoppage for all time in progression, seniority and all Benefit Plans with the exception of the Pension Plan. Credited service for pensions will commence of October 1.

The language is very important. First, the company "agrees to extend credit" this implies an concession by the company. It is certainly possible that a settlement could have been reached that extended credit for nothing. The idea here is that when a strike is called the strikers must rely on the economic power of the strike to determine which benefits they will or will not be able to negotiate for. This settlement represents the best package that the union was able to negotiate for. The Memorandum of Agreement was the basis for the new three year contract that was to follow. It therefore logical to presume that the language that precipitated the contract should take precedence over any subsequent contract language that may appear to be in conflict. Without the Memorandum of Agreement, there would have not been any new

contract.

Second, the language in the agreement refers specifically to the work stoppage. It does not designate certain groups of employees. It does not say that these terms apply to those who engaged in strike activities. It instead speaks only of the work stoppage. The union was responsible for the work stoppage. Therefore all bargaining unit members represented by the union are subject to the terms of the Memorandum of Agreement.

The company points out that no other employee, on a leave of any type, has been credited for pension service during the time of the strike except for the time after the agreed upon commencement date. To credit Mrs. Chance would only serve to create a special provision for her and only her. Mrs. Chance was able to enjoy all of the other benefits that were negotiated by the union on her behalf. No singular contract was created to exempt her from any of the benefits that she received as a result of the strike. Why should one be created to exempt her from a negotiated settlement that happened to not benefit her personally? Mrs. Chances's opportunity to make her views heard came in the form of her union's ratification vote. Whether or not she voted really does not matter now.

Finally, we come to the issue of timeliness. We cannot discount the importance of filing a timely grievance. The

contract expressly states the timeframe in which a grievance may be submitted. The company cannot be simply expected to ignore this contract language. It exists for a reason. The company cannot be subject to disputes that should have been resolved fifteen years ago. The contract clearly states that a grievance must be filed within thirty calendar days of its occurrence. This issue occurred when the Memorandum of Agreement was set forth fifteen years ago. Mrs. Chance's ignorance of the terms of the agreement is not an excuse. A grievance by nature, deals with contract language. In order to file a valid grievance, one must be aware of the contract language. Just because Mrs. Chance wasn't aware of this situation or didn't think it affected her does not exempt her from the provisions regarding timeliness that are clearly spelled out in the contract.

4. A. Union BATNA: What Must We Prove to Win?

To win at arbitration, the union must demonstrate that Mrs. Chance was not on strike during the four months in question. This is the key to the case. The timeliness issue can be easily averted. The best strategy for the union is to center on the issue of retroactively taking away accrued benefits. Mrs. Chance accrued her benefits through a contractually legitimate means. The Memorandum of Agreement did not take place until Mrs. Chance had already accrued pension service for those four months. The issue is different for the rest of the strikers, they didn't actually

work, nor were they an a contractually legitimate leave that would allow them to accrue pension service credit. Of course, the company will make the argument that no other workers on any type of leave have been credited for the four months of the strike except by the provisions of the settlement agreement. The union must convince the arbitrator that this in no way should negate the validity of Mrs. Chance's grievance. Maybe no other worker was on worker's compensation leave during the time of the strike. No one has this information. Just because no one else has filed a grievance about this issue does not mean that it is without merit.

The union must also make some effort to show how this lack of pension service credit harms Mrs. Chance. The career average formula for computing pension service would not allow credit for the time that Mrs. Chance was on worker's compensation under any circumstance. Strike or no strike. Consequently, Mrs. Chance's only option is to use the alternate formula. Under the alternate formula, Mrs. Chance would be adversely affected because the four months of the strike would not be used in the calculation. This clearly would have an adverse affect on her pension benefits. The union must keep in mind that these facts are really not central to their argument. Obviously, subtracting any length of time from ones pension service credit is going to have an adverse effect. These facts are used best for merely illustrative purposes. After all, we want the arbitrator to

want to rule for Mrs. Chance. These facts may be useful in that capacity. The real task is enabling that arbitrator to rule for Mrs. Chance.

Enabling the arbitrator to rule for Mrs. Chance brings us to the heart of the issue. For the union to be successful at arbitration, it must center on the issue of retroactively affecting accrued benefits. It is clear that at the time of the Memorandum of Agreement, Mrs. Chance had already accrued her pension service by the means of an approved leave. The company will counter this argument by saying that as a member of the bargaining unit, she was a party to the strike and therefore could not have accrued any benefits in the first place. This seems to be a very grey area. The union realizes that there is a very good chance that the arbitrator will rule that Mrs. Chance was on strike by virtue of her bargaining agent's decision. Since the outcome of an arbitration is anything but certain, it may be in the union's best interest to try to negotiate a settlement short of arbitration.

4. B. Management BATNA? What Must We Prove to Win?

The company has two main issues to center on in arbitration. First, the timeliness of the grievance. Theoretically, Mrs. Chance should have realized how the Memorandum of Agreement would affect her future pension calculation at the time it was drafted. She should have filed a grievance at that time regarding the pension service exception in the Memorandum of Agreement. While the company believes that this is a proper interpretation of the contract language regarding the timeframe for filing a grievance, it realizes that an arbitrator is going to rule that the complaint could not arise until the matter directly affected Mrs. Chance. Although the company does not agree with this interpretation it accepts it as a very likely decision on the part of the arbitrator.

Upon relinquishing the timeliness argument, the company must move on to the merits of the case. In the view of the company, there is one key factor that should determine the outcome of this arbitration. The whole case is reduced to the question of whether or not being a bargaining unit member automatically makes her a party to the strike. If it does, then there is no question that she should be credited according to the terms of the Memorandum of Agreement. If this is the case, it does not matter what kind of leave she was on. It does not matter if she was willing or able to take part in strike activities. It does not matter if the union specifically told her to refrain from participating in

strike activities. Section 7 of the Labor Management Relations Act gives employees the right to refrain from strike activities. It is important to note intent of this legislation because it has specific relevance to this case. The intent of this legislation was to keep the union from forcing employees to participate in strike activities. In fact employees have the right to return to work if they so choose. This is protection from union domination of personal behavior. It does not, however, exempt employees from the terms negotiated by their exclusive bargaining agent. It does not exempt employees from the general decision of the union to strike.

Even with all of this in mind, the company recognizes the outcome of an arbitration is extremely unclear. An arbitrator could conceivably conclude that Mrs. Chance accrued her pension service in accordance with the contract. This would mean that the Memorandum of Agreement would be in conflict with the contract language in the case of Mrs. Chance.

One further possibility is that an arbitrator may rule that Mrs. Chance could not have contractually have accrued pension service during the time of the strike because no contract was in effect at that time. Pension service can only be accrued through the provisions set forth in the contract. Since no contract existed during those four months, no pension service could have been accrued. This line of reasoning would also indicate that the

terms of the Memorandum of Agreement would set forth all conditions of determining pension service credit for the time in question. This also nullifies the argument over adversely affecting accrued benefits. No matter what kind of leave she was on, Mrs. Chance could not accrue pension service except by the terms of the Memorandum of Agreement.

Obviously, the company believes that this is the correct interpretation of this matter. On the other hand, the company realizes that this matter is somewhat subjective in nature. If possible, the best solution may be to settle short of arbitration.

5. A. Union BATNA Tactics

The best BATNA tactic for the union is to play on the fairness issue. The union could circulate the word that Mrs. Chance is being unfairly victimized by the company. After all, she was injured and could not participate in any strike activities even if she wanted to. Painting the company in a negative light could have a significant effect on overall morale and employee attitudes towards the company. If other employees believe that Mrs. Chance is being unjustly treated this could be detrimental to the company. General, resentment of the company could result in lower productivity or even sabotage by the workers.

The union also has the possibility of bringing up an ERISA violation. It appears, however, that the application of the ERISA statutes would be subject to the same arguments

that would be offered in arbitration.

All in all, the union must fulfill its obligation of representation, yet it must recognize that this is an isolated and relatively obscure case. The benefits of retaining equitable relationships with the company may outweigh the issues at stake in this particular case.

5. B. Management BATNA

Management would be best served to play on the anti-union sentiment that is already so prevalent in society today. Here we have a case of a union member who is more than content to freely claim all the benefits that the strike afforded her, but is not willing to accept the settlement that granted her those benefits. It is a case of another union member that is never satisfied. A union member that wants to drain the company of every last cent that she can get. Being a union member means succeeding or failing together, not trying to negotiate your own best deal by trying to disassociate oneself from the union after the fact.

An argument like this, if persuasively presented, might even foster some resentment among fellow union members.

The question that the company must consider is: Is it worth it? Does the company really want to upset relations with the union over a case like this one? This is only an isolated incident pertaining to only one employee. The best BATNA for the company may be taking no action at all.

6. A. Identifying Interests: Union

The union is interested in dutifully representing Mrs. Chance. The believes that since Mrs. Chance did not participate in any strike activities and was on a contractually approved leave she should be entitled to credit for the time in question.

The union must also consider the bigger issue that is in question. Are individual union members subject to the actions of the union? On this point the union may actually indirectly benefit from a decision that affirms this notion. Such a notion would actually enhance the solidarity of the union by showing members that they win or lose collectively. Union initiatives are best achieved by total support of the membership. If union members see that they cannot negotiate their own best deal, they may be more likely to support a collective purpose.

Of course, these same circumstances might foster resentment and fighting among union members themselves. The fact is that the union has the issue of image to deal with in this case. The perceptions of the individual union members may be hard to guess.

The union may want to avoid this issue altogether by settling the matter short of arbitration.

6. B. Identifying Interests: Management

Management wants to maintain the integrity of the terms of the strike settlement that it negotiated fifteen years ago.

The Memorandum of Agreement was the result of an economic test of strength between the company and the union. Any concessions of benefits gained by either party were a direct result of their respective economic strength.

The strike was financially detrimental to the company. As a result of enduring the strike, the company was able to negotiate certain terms with the union. The language regarding pension service calculations was one of the terms negotiated.

The company does not believe that Mrs. Chance should be exempt from the terms of this agreement. Furthermore, the company does not want the obligation to negotiate with individual union members. The company feels that all bargaining unit members should be subject to the actions of the union of their choice.

Under no circumstance does the company want to set a precedent by this particular case.

7. Opportunities for Mutual Gain

If the company loses they may have to deal with every other employee that may have been on a leave of some kind during the strike who thinks he or she is entitled to credit for the four months. If the company agrees to settle without setting a precedent, they can possibly avoid future disputes. Such a settlement may be acceptable to the union whose primary interest is representing Mrs. Chance. This could put an end to a situation which may very well never present itself again. If the company is able to look past the issue of rights, this may be its best solution to the dispute.

8. A. Acceptable Settlements: Union

The union can really settle for nothing less than full credit for the time in question. If the company will not settle for this then the union is forced to take the matter to arbitration. Anything less, and the union may be found guilty of not maintaining its duty of fair representation. This is really an all or nothing case for the union. The only concession that the union may be willing to make would be to stipulate that this case shall not set a precedent for further pension service disputes. Such an agreement would be acceptable to the union in light of the strength of its case.

8. B. Acceptable Settlements: Management

In this case there are really only two possibilities for settlements. Either we credit Mrs. Chance for the four months in question or we don't. The company believes that it has a better than average chance of being successful at arbitration. With this in mind, the company would reluctant to simply give in to the union's demands. In order to avoid future claims of this nature, it might be in the best interest of the company to take the matter to arbitration. The only possible alternative would be to credit Mrs. Chance for the four months in question, but to stipulate that this should not set a precedent for future claims.

Sean M. Bundas

Case Log
Unlucky Strike

One thing is for sure, this case was significantly more confusing and difficult than the previous two. The first time I read it, I immediately reread it to try to figure out just what the main issues were.

In class questions were brought up about the two pension calculation formulas. This only served to further confuse me at the time. As time went on I came to the conclusion that the pension formulas really were not central to the main issue of the case. Had there not been a strike, Bonnie could have simply chosen the formula that was most beneficial to her. I guess that is why there was two of them.

Initially, I was also confused about the language concerning Pension Service. At first, it seemed to me that this language excluded time on worker's compensation in any case. If this was true, then the strike would not have mattered. After you pointed out that the language talked about "absences from employment" I got the picture. Bonnie was not absent from employment when she was on worker's comp.

With this in mind, I seemed to be able to get to the real dispute in this case. The problem centered around the interpretation of whether or not Bonnie was on strike. Does being on strike mean participating in strike activities? Or is one on strike if one's union calls a strike? This seemed

to be the real question in this case. Even after finishing the case, I am still not sure of the answer. I have shared my thoughts with some of my classmates and we seem to agree that the company has the upper hand in this dispute.

I have wrestled with another question throughout doing this case. If the previous contract had expired (which must have happened when the strike occurred or the union would have been violating the implicit no strike agreement) how can one apply any contract provisions to the events that transpired during that time period? What I am trying to say is: How can Bonnie point to contract language that talks about accruing and changing pension benefits when in effect no contract was in place during that time? It seems to me that the only provisions that can refer to events that occurred during this void in contracts, is the settlement agreement.

I tried to look through Elkouri and other published awards to find the answer to this question. The only things I could find were decisions regarding holiday pay that fell between contracts. In these cases, the arbitrators generally ruled that since holiday pay was a creature of the contract and no contract was in place, the employees were not eligible for holiday pay during these periods.

I felt that pensions, like holidays, were creatures of the contract. After all, the pension plan was jointly negotiated. This would seem to indicate that Bonnie would not be entitled to the pension service that took place during

the strike. I think this is the correct interpretation, but I am still not completely sure.

Overall, I think I did a fairly decent job on this case despite the problems that I had. One thing that is I find sort or strange about doing these case is setting forth two good arguments that are often conflicting. Doing so often requires being persuasive about a point that I actually do not believe. Sometimes, even if it is B.S., it is the best thing that I can come up with for one side or the other. I guess this is the nature of arguing for both sides. In reality this probably happens when arguing for only one side. Probably, in some instances, one can identify the merits of the opponents argument. The thing is, one's role requires that he or she must stick to an interpretation that is solely beneficial to the side which he or she is representing. Such circumstances require a mastery of the art of persuasion. I am going to keep working on it.

Donald S. McPherson © 1993
University Professor of Industrial Relations
Indiana University of Pennsylvania

JUNE, JULIE AND AUGUST

On May 13, 1991, the Estival Co. hired 18 college students as summer employees. As a condition of their employment, each of the 18 voluntarily signed prior to the date of his or her reporting for work a letter of termination providing: "It is understood and agreed that I will terminate my employment at the end of the summer vacation season, on or before August 24, 1991."

The college students were hired as replacements for regular employees during the peak vacation period and five had worked in that capacity the previous summer. From the early 1970s until 1990, Estival had regular employees on layoff and therefore did not hire summer employees. No one representing either the Company or the Union has any recollection or record of any official transactions, if any, occurring between the parties regarding summer employees in the years when they were regularly hired prior to the early 1970s.

The Company did not seek any special agreement from the Union for college student employment in summer, 1990, when 27 students were employed. In 1990, the Company sought verbal agreements from each of the college students when they began work in May that they would resign and return to college prior to August 31. All student summer employees resigned and no grievances were filed concerning summer employment in 1990. The Company also did not discuss 1991 summer hirings with the Union or copy to the Union the employees' resignation letters.

Estival sought 1990 and 1991 summer employees by reference from incumbent regular employees, through notices sent to area colleges and universities, and from the State Department of Employment Security. Because the summer employees were hired only into low-skill, laborer positions, they did not go through pre-screening with the State Employment Office as do full time regular employees. Instead, they completed regular employment applications with "Summer" and the year written at the top, were interviewed, and were given a physical exam.

During the interviews, the applicants were asked whether they intended to return to college and were told that they were being hired as temporary summer replacements for regular employees and, as a condition of their employment, would be required to resign by a specified date. In both 1990 and 1991, the summer college student employees became members of the Union after the 30th day of their employment as required by the union security provisions of Article III.

Prior to clocking out on August 24, 1991, three of the college students, June Morn, Julie Gloaming, and August Knight demanded that the Union President file on their behalf a grievance alleging that they had the contractual right to remain on the job since they were beyond their probationary period. The grievants said they wanted reinstantement to their positions, full seniority, and back pay for any time that might be lost. Local Union President Ferd Lammas agreed and filed the policy grievance on August 25, 1991.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE II UNION RECOGNITION

The Company recognizes the Union as the exclusive representative for the purpose of collective bargaining for all employees as defined herein. The term "employee" shall include all hourly-rated general service, production, operations and maintenance workers, laboratory technicians, and laborers.

ARTICLE III UNION MEMBERSHIP

All employees shall, as a condition of continued employment beginning on or before the thirtieth (30th) day following the beginning of their employment, acquire and maintain membership in the Union. Membership dues will be deducted from the paychecks of such Union members by the Company and remitted monthly to the Union.

ARTICLE VI ADJUSTMENT OF GRIEVANCES

Section 1. A "grievance" is any dispute between any employee or the Union and the Company concerning the interpretation or application of the terms and conditions of this Agreement. Grievances must be filed within 15 days of the circumstances giving rise to the dispute.

* * * * *

Section 4. No Arbitrator shall have jurisdiction to add to or subtract from or modify any of the terms of this Agreement.

ARTICLE VIII PROBATIONARY EMPLOYEES

Every new employee shall be a probationary employee for a period of forty-five (45) calendar days from the date of first reporting to work; but, when such probationary employee has been employed for forty-five (45) calendar days, he/she shall become a regular employee with seniority computed from the date of hire. The Company may, in its sole discretion, discharge any probationary employee and such discharge shall not be made the subject of a grievance.

ARTICLE IX SENIORITY

Section 1. Seniority as used in this Agreement shall be continuous service since the most recent date of hire. Continuous service shall be terminated by: 1) discharge for cause; 2) voluntary quit; 3) absence due to lay-off exceeding three (3) years; 4) failure to report after recall from layoff within 5 days; 5) failure to report within 5 days of expiration of a leave.

* * * * *

ARTICLE XXVII MANAGEMENT

All rights to manage the Company not expressly surrendered herein, including but not limited to the rights to direct the working forces, to direct, plan and control plant operations, and to hire, transfer, promote, demote, lay off, suspend or discharge employees for cause, are vested exclusively in the Company, provided that in the exercise of these rights the Company shall not violate any provisions of this Agreement.

David Knappenberger

LR641
November 11, 1993

JUNE, JULIE, AND AUGUST

1. Written Union Grievance

NAME OF GRIEVANTS: Ms. June Morn, Ms. Julie Gloaming, Ms. August Knight, and all other affected employees.

DATE OF GRIEVANCE: August 24, 1991 and continuing

CONTRACTUAL PROVISIONS CITED: Article II, Article VIII, Article IX, and all other relevant provisions of the collective bargaining agreement.

STATEMENT Of GRIEVANCE:

On August 24, 1991, the Company ended without just cause the employment of Ms. June Morn, Ms. Julie Gloaming, Ms. August Knight, and fifteen other employees. These employees had worked successfully through their 45 day probationary period and all these employees are members in good standing with the Union. None of these employees had any misconduct of any kind held against them during their employment with this Company. Therefore, their employment was ended without just cause.

Relief Sought: The Union requests that the Company make whole employees June Morn, Julie Gloaming, August Knight, and all others affected in

every respect in that they be reinstated to their positions held prior to August 24, paid full back pay, and suffer no loss in seniority or company benefits.

2. Written Management Negative Response

The three employees named in the Union grievance, Ms. June Morn, Ms. Julie Gloaming, Ms. August Knight, and the fifteen other employees referred to, all voluntarily signed letters of termination dated May 13, 1991, in which they stated their intent to discontinue employment with this Company on or before August 24, 1991. Further, during the interview process, all were made very aware that the positions for which they were applying and for which they were subsequently hired were temporary summer positions that would end on August 24, 1991. All understood and agreed to this condition. Also, the employment application that each filled out and signed was clearly marked "Summer 1991" on the top.

The employment of Ms. June Morn, Ms. Julie Gloaming, Ms. August Knight, and all of the others referred to, was terminated by mutual written agreement and consent of the company and these individuals. Therefore, the Union grievance is denied.

3. A. Union Theory of the Case

On May 13, 1991, the Estival Company hired 18 college students to positions the company says were "temporary, summer positions." Nowhere in the

collective bargaining agreement between Estival Co. and this Union is there any mention of "temporary, summer positions," nor is there any mention of the "temporary, summer employees" that, by definition, would fill these positions. There is, however, much contract language that defines and deals with "employees."

Article II, Union Recognition defines the term "employee" as to ". . . include all hourly-rated general service, production, operations and maintenance workers, laboratory technicians, and laborers." This is certainly an all inclusive definition of "employee."

Article III, Union Membership, says that "all employees" will become union members on or before their thirtieth day of employment. Article VIII, Probationary Employees, says that after forty-five calendar days of his or her first day of employment, ". . . he/she shall become a regular employee with seniority computed from the date of hire."

Article IX, Seniority, is important to our story also. It states: "Continuous service shall be terminated by: 1) discharge for cause; 2) voluntary quit; 3) absence due to layoff exceeding three (3) years; 4) failure to report after recall from layoff within 5 days; 5) failure to report within 5 days of expiration of a leave.

Before any of the 18 college students were hired this summer all were forced to sign, as a condition of employment, what the company called, a "letter of termination" stating: "It is understood and agreed that I will terminate my

employment at the end of the summer vacation season, on or before August 24, 1991."

The Union believes this letter has no validity at all and might very well constitute an unfair labor practice by this company. Even though this letter was signed before these people were hired, its effect was clearly on terms and conditions of employment after these people became employees. The company, therefore, bypassed the Union and bargained directly with the employees. The Union believes this is a violation of Section 8(a)(5) of the Act, refusal to bargain collectively with its employees, and also employer duty to refrain from unilateral action in making changes in terms and conditions of employment.

When June Morn, Julie Gloaming, August Knight and the fifteen other people signed this statement, they had no idea that they were being tricked by the company into signing what amounts to an illegal, or at least an extralegal, document. They had no idea they were being pigeon holed into an employee category that, contractually, does not exist, and they had no idea the collective bargaining agreement protected them from this written statement. Also, because of the huge amount of paper work involved these days in the hiring process (everything from W-2's to insurance forms) this one document may very well have passed by the applicants with little or no notice. Its supposed importance became apparent later.

The Company did not bother approaching the Union with this problem or they would have found us to be sympathetic and cooperative. After all, our members are the ones who benefit from the expanded work force making summer vacations easier to schedule. After we were approached by the three

young ladies mentioned above and the situation was explained to us, we had no recourse but to uphold the collective bargaining agreement as it now exists, and to file this grievance on behalf of June, Julie, August, and all the other employees who were mistreated by this company. This whole episode could have been avoided if the company had approached and bargained with the legal representatives of their employees as they are required to do by law.

We now understand that a similar situation occurred during the summer of 1990. However then, the company did not insist on written agreements only on verbal agreements. These verbal agreements were just as improper as the written ones but the Union was never aware of them as we are now of these 1991 written versions.

During their interviews, these applicants were all asked if they intended to return to college in the fall. June, Julie, and August all said yes because, at that time, that is what they intended. They were also told they were being hired as "temporary summer replacements" and, as a condition of their employment, would be required to resign by August 24th. They were never asked if they would quit, they were just told they had to. Even if the company had asked, they probably would have said yes. It has become human nature to agree to just about anything when seeking employment, especially at the age of these applicants. None of this, however, amounts to a hill of beans when viewed from the collective bargaining agreement, the "rule book" that governs relationships between this group of employees and the company starting the day they were hired.

What does matter is these 18 people were hired on May 13, 1991. Thirty days later, on June 12th, they became members in good standing with this union, and on June 27th, their probationary period with this company ended. Since that date there are basically two ways they could leave the employ of this company.

One is to "voluntarily quit." The Union strongly feels that there was nothing "voluntary" about how any of these people left the company. These employees were the victims of an unfair labor practice by being forced to sign an agreement that changed the terms and conditions of their employment in a way not covered in the collective bargaining agreement. They were asked questions about their future plans that have no bearing on what actually happened (who among us can tell the future?) and they were told they were being hired into a condition of employment that did not, and does not, contractually exist.

Also, their employment applications were marked "Summer 1991" at the top. The company can put anything it wants on an employment application within federal regulations. This particular heading has no contractual importance since it has not been bargained for between the company and the union. Those who quit on August 24th did so because they thought they had to quit. There was nothing "voluntary" about it.

The second way they could leave the company is by being discharged for cause. None of the 18 employees hired this summer had any disciplinary actions of any kind taken against them by this company. They all were competent workers who performed their jobs well. The company has expressed no complaint about them. None of these people were terminated for cause.

What is left, then, is the fact that these 18 people were terminated without just cause by this company. Since all 18 of these people were contractually "employees" who had successfully completed their probationary period, who were all members in good standing in this Union, and who had no disciplinary charges against them, all 18 should be reinstated to their positions with full back pay and no loss of company benefits. Also, since this does not constitute a "voluntary quit" under Section 1 of Article IX, they should suffer no loss of seniority.

3. B. Management Theory of the Case

The last two years have been relatively good for the Estival Company. Business has improved to the point that, for the first time in twenty years, this company has no one on layoff. Conversely, a need for temporary summer employment has developed so that our regular full time staff can enjoy their vacations during the summer months, when the desire to take vacations is, understandably, the highest.

To that end, the Company wanted to reinstate a policy from some twenty years ago of hiring temporary employees for the summer months, mid-May through most of August to act as "fill-ins" for those regular employees who were on vacation.

The Company decided this would be a good opportunity to give area college students and other area young people the chance to receive some work experience and some pay while they filled a need that the Company now has. The Company was also aware of the good public relations it would enjoy by, once again, becoming an employer of our area's youth. We believed this would be an "everybody wins" situation for the Company, the Union, and our area young people.

Quite honestly, no one is now around that was here when the Company last had such a summer employment program some twenty years ago, and so the Company was starting, in fact, a new program.

We knew what we were looking for; young "summer only" employees, to fill low-skill, laborer positions. We saw no need to go through the pre-screening procedures with the State Employment Office as we do when hiring regular employees. During our first summer (1990) we felt verbal agreements with each of the summer employees that they would be with us only through the last of August was sufficient, and that worked quite well. We felt, however, in 1991 that we should formalize this process with written statements.

Our reason for doing this was that we wanted to make quite sure that the young people we hired understood clearly that they were being hired for summer replacement type employment only. We did not want them to get the wrong idea that they were being hired as regular, permanent employees.

The Company instituted a three-part program to make sure these temporary employees understood what kind of employment they were entering:

First, each application for employment filled out by one of these young people was clearly marked at the top with: "Summer, 1991."

Second, during our interviewing process, each applicant was told in no uncertain terms that they were being hired as temporary summer replacements for regular employees, and would be required to resign by a specific date. In this year, 1991, that date was August 24th.

Third, on May 13th the Company asked each applicant to voluntarily sign a letter of termination providing: "It is understood and agreed that I will terminate my employment at the end of the summer vacation season, on or before August 24, 1991."

This year, the Estival Co. hired 18 college students for the program described above. All agreed to the terms listed above. All understood that this was summer employment only and that none of them would be kept on after August 24th. All were good workers; the company has no complaints about them in this regard. All but three decided to keep their agreement with the Company and leave their employment as agreed on August 24th.

Ms. June Morn, Ms. Julie Gloaming, and Ms. August Knight asked the Union to file a grievance on their behalf stating that they should be kept on past their agreed to departure date of August 24th even though each of them voluntarily signed a letter of termination on May 13th stating they would terminate their employment with this company on or before the 24th of August.

The Company understands that these three individuals as well as the other fifteen students that were hired this summer became Union members after their 30th day of employment. The Company understands it cannot and should not influence one way or the other an individual's decision to join a union. And, the Company understands the Union's responsibility to follow through with this grievance or risk possible suit by these three individuals.

But both the Union and these three young ladies have to understand some things as well. First, the Company has an implicit right to hire whomever it sees fit. This right is even spelled out in the collective bargaining agreement under article XXVII. The Company has no duty to go to the Union when it decides to hire temporary summer employees.

Secondly, these people were temporary summer employees and were never meant to be confused with the "regular" employees referred to in article II of the collective bargaining agreement. That is why the Company went through so many painstaking steps throughout the hiring procedure of these people so that they would realize what they were and, just as importantly, what they were NOT.

It must be remembered that each of these people voluntarily signed a letter of termination on May 13th, saying they would terminate their employment on or before August 24th. This constitutes a "voluntary quit." On August 24th, none of these people were fired or terminated, their signed letters of termination were accepted by the company and their temporary summer employment was concluded as agreed to by all parties on May 13th.

Further, the union must be aware that there is no work available for these three individuals or any of the other 15 people hired temporarily this summer. If the Company were forced to accept the union's grievance, the Company would be forced to lay these individuals off due to lack of work. Then, this "everybody wins" program would turn into an "everybody loses" program that might be discontinued by the company. This would have a direct impact on our regular union employee's ability to take vacation when they desire next year, the very situation the Company has been trying to avoid with its summer employment program.

Finally, these individuals were well aware of the kind of employment (temporary, summer employment) they were getting into. They agreed to this verbally during their interview and in writing with their letters of termination dated May 13th. The Union's grievance is without merit. The Company's actions should be upheld.

4. A. Union BATNA: What Must We Prove To Win?

To win at arbitration, the Union must prove than the letters of termination signed by each of the 18 people hired on May 13, 1991, did not constitute valid voluntary quits under the collective bargaining agreement. Since they were a term of employment it would seem easy to prove that they were not voluntary in nature. These 18 people were not asked if or when they wanted to leave the employ of this company and none of them of their own free will came forward and announced they would be leaving on a certain date, they were told in no uncertain terms that they <u>had to quit</u> by the 24th of August or they would not be

hired. The chances of an arbitrator ruling that such a "quit" was "voluntary" are next to nothing.

The Union was never approached by the company to bargain terms through which temporary employees could be hired. This will prove to the arbitrator that these agreements on terms and conditions of employment were "negotiated" individually with each perspective employee outside the framework of the lawfully elected bargaining unit representative, the Union, and therefore constitute an unfair labor practice.

The Union can prove that these 18 people meet the contractual definition of "employee" and of "Union member." They have all been employed at least 45 days, which takes them through their probationary period, and they all became union members after 30 days.

There have been no written warnings or verbal warnings issued to anyone in this group, so the company has no grounds for discharging any of them for cause as is their right under Article XXVII.

Considering the above, the Union will win this case at arbitration. However, will the arbitrator rule that these 18 individuals must be reinstated with back pay, no loss of benefits, and no loss of seniority? Since there are no jobs to reinstate these people too, the true outcome of this arbitration has many possibilities. The arbitrator might tell the company to put them back to work. The company would promptly lay them off due to lack of work. The arbitrator may award them all back pay or partial back pay or no back pay. There is no way of knowing that until the arbitrator announces his decision.

Because of the costs involved, and because of the varied true outcomes possible if this case continued to arbitration, the Union should try to negotiate a settlement with the company. With an unfair labor practice charge hanging over its head, the company should wish to negotiate and the union might be in a position to get a settlement superior to an arbitrator's award.

Therefore, although assured victory at arbitration, the Union should seek to negotiate a settlement with the company before arbitration.

4. B. Management BATNA: What Must We Prove To Win?

Management's case has three pieces of "hard" evidence quickly noticeable in an analysis. First is the signed "letter of termination" dated May 13th from each of the grievants. Second is the verbal exchange that took place at each of the grievant's interviews. Third is the employment application of each grievant marked clearly, "Summer 1991." These all should prove that the intent of the Company was to hire summer help only and that none of these grievants had any reason to believe that they were hired for anything more than that.

It seems, however, that these pieces of evidence come into direct conflict with several pieces of contract language. First, Article II, Union Recognition states that the Union is the exclusive representative for the purposes of collective bargaining for ALL employees. And "employee" is specifically defined to include "ALL hourly-rated general service, production, operations and maintenance workers, laboratory technicians, and laborers."

Further, all of these "temporary" employees became Union members on their 30th day of employment, a fact the Company does not dispute. Then, after their 45th day these "temporary" employees completed their probationary period and fit the definition of a "regular" employee with seniority.

Discharge for cause has already been discounted by the Company. The Company found these employees to be satisfactory in their work and they were not terminated for just cause.

The question is: Does their "letter of termination" dated May 13th constitute a voluntary quit?

Research suggests that an Arbitrator would not find this to be the case. This "letter of termination" was clearly a condition of employment, there was nothing voluntary about it. If the prospective employee had not signed the letter they would not have been hired. This is not a "voluntary quit."

What is lacking to substantiate the Company's argument is any reference to "temporary employee" in the collective bargaining agreement. An Arbitrator might understand the intent of the Company to hire temporary employees, he may even agree with its necessity and good business sense, but there is nothing in the contract that gives the company the right to institute such a program unilaterally (no matter how good it is).

In the contract, after the 45 day probationary period, an employee is an employee, there is no such thing as a "temporary" employee and an employee can only be terminated for cause (which is not the case here) or through a

voluntary quit (which cannot be defined as a mandatory pre-employment agreement).

Further, Section 4 of Article VI states; "No Arbitrator shall have jurisdiction to add or to subtract from or modify any of the terms of this Agreement." Even if the Arbitrator was of a mind to expand the contract language to include some kind of "temporary" employee, he is forbidden to do so by this clause. He must use the definitions as presented in the agreement.

An Arbitrator might agree in principle with the intentions of the Company but he would rule against the Company at an arbitration based on the contract language. There are no jobs currently available for any of these 18 people so if an arbitrator ruled that they be reinstated the Company would be forced to immediately lay them off. The Company might be liable for a back pay award. The Company should therefore try to settle this case with the Union short of arbitration.

The best and least costly solution would be to agree to put these three individuals on lay off so that they would be the first to be recalled if any openings occur. The Company must remember that under Number 3 of Section 1, Article IX, these employees will continue to accumulate seniority for the next three years, but there seems to be no way around that. The other fifteen might have to be put on lay off too, but since they have all returned to college it is doubtful that any would accept employment if it where offered at some later time.

The Company should then negotiate language acceptable to it and to the Union concerning the hiring of temporary employees so that these problems and costs can be avoided in the future.

5. A. Union BATNA Tactics

One possible action the union might take would be to contact area colleges and universities and let them know how this company "strong armed" its summer employees. This could be done most effectively through a word of mouth campaign at the student level and could dry up a very good supply of needed workers.

Since some of these summer employees seemed to be found by reference from incumbent regular employees, the Union could also let its membership know that this was probably NOT a company that you would recommend to young family members or friends.

The Union should file an unfair labor practice charge against the company for violating Sec. 8(a)(5) of the Act; refusal to bargain collectively with representatives of the employees. In making employees sign a letter of termination as a condition of employment without first bargaining with the Union about this condition of employment, the company probably committed an unfair labor practice.

The Union could point out to the company that a pool of trained laid off employees might not be a bad thing to have. They could be called upon if an

unexpected vacancy occurs and they may still be available for summer work next year, with much less time needed to be spent in the hiring and training areas than with new hires.

The local president, along with the executive board should write a letter to the president of this company asking why the company did not approach the Union when it wanted to start this temporary employee plan. They should point out the company would have found the union cooperative and maybe would have learned how to administer this program more efficiently than they had reasoned. This is an opportunity for the Union to point out that they are equal partners in this business situation and need to be treated as such. The company is only hurting itself when it fails to remember this. The International or National of this Union should also send such correspondence.

5. B. Management BATNA Tactics

Management could try to get the word out that they are trying to help area college students by offering summer employment and the Union is standing in their way. This could help fuel the antiunion sentiment that seems to be prevalent in society today and might help the company during the next round of collective bargaining. The company could take out a newspaper add to do this, but a subtler word of mouth campaign might be more effective.

Management could inform the Union that if it continues to press this grievance the Company will not hire temporary employees next summer. The

vacation schedules of the regular employees would, therefore, have to be adjusted to guarantee adequate staffing. This would no doubt mean that some Union members would not be able to take their vacation when they wished, and the fault would lie with the Union, not the company. This would cause internal conflicts in the union and the union might modify their position to avoid it.

6. A. Identifying and Articulating Interests

UNION

The Union has the duty to defend the rights of all of its members when they are violated. It must stick up for the "young" member as well as the "old." This will help give a more positive image of unions to younger people, members and nonmembers alike.

The Union also has the duty to defend contract language it bargained long and hard for from attempts by management to bypass it with unilateral actions. The Union also has the obligation to explore possible unfair labor practices committed by the Company.

The Union has an interest in making it as easy as possible for its members to enjoy their earned vacations whenever they wish. For this reason, the Union needs to sit down with the Company and agree to a temporary summer employee hiring plan. Everyone involved could benefit from this plan.

The Union could also benefit from "working with" rather than "working against" the company on this issue. It could point out to its members that when it

finally was approached by the company, the Union creatively and positively solved this company's problem.

6. B. Identifying and Articulating Interests

MANAGEMENT

Management's interests include maintaining a pool of temporary employees for summer fill-in positions while its regular work force is on vacation. This would guarantee the continued smooth operation of the business during the summer months and would also help maintain good management - worker relations because the regular work force would be able to take their vacation during the most desirable time.

Management also wishes to maintain good relations with the Union. This could be accomplished by sitting down with the Union and agreeing to a system of temporary summer hires.

Management wants to maintain a good public image that would be enhanced by this "trouble free" summer employment program.

7. Identifying Opportunities for Mutual Gain (shared interests)

One area for mutual gain is an agreed upon method for the employment of temporary summer employees. Both the Union and the Company would

benefit. The Company would have the staff it needs, and the Union members would be able to take their vacations when they desire. They need to sit down and write an agreement whereby a specific number of temporaries can be hired for a specific time, enjoy the benefits of employment and Union membership while in this time frame, and end their employment when their services are no longer needed. Many, many companies and unions have such agreements and it should not be very difficult to hammer one out here.

Another area for mutual gain would be the increase in good public relations both the Union and the Company would enjoy after they hammer out and announce an agreement whereby local college students will have the opportunity for summer employment.

Both groups would also enjoy the "internal goodwill" derived from working together to solve a problem rather than always playing the adversary roles.

8. A. Specifying Acceptable Settlements

UNION

The Union agrees to settle this matter with the Company short of arbitration if the Company agrees to change the termination of Ms. June Morn, Ms. Julie Gloaming, and Ms. August Knight and any other so affected employee to a layoff under all applicable language of the current collective bargaining agreement. The Union further agrees to sit down with the Company and hammer out language pertaining to the summer hire of temporary employees agreeable

to both the Union and the Company. The Union further agrees to drop its unfair labor practice charge [violation of Sec. 8(a)(5)] pending against the company.

8. B. Specifying Acceptable Settlements

MANAGEMENT

The Company agrees to settle this matter short of arbitration in the following manner:

1. The Company agrees to change the voluntary quit of Ms. June, Ms. Gloaming, Ms. Knight, and all of the other fifteen employees hired on May 13, 1991, to a lay off in accordance with all applicable provisions of the current collective bargaining agreement.

2. The Company and the Union agree to sit down together and come up with mutually agreeable language for the hiring of temporary employees for the summer months.

David Knappenberger

LR641
November 11, 1993

The Following is the Case Log for the Case Titled:

June, Julie, and August

I think this case, more than the first two is going to need some outside "expert" help. The big question: What is the legal status of a letter of termination that you had to sign before you began working as a condition of your employment?

I have had to sign two closed ended contracts in my employment past, one in a non-union environment and one in a union environment. The non-union situation was a summer college job which I had no desire to keep. The union situation was at a TV station in Pittsburgh, a job I would have loved to keep but there was contract language in place to handle "summer replacement employees" like myself. Which brings up the BIG QUESTION: why did the Union and the Company fail to work out this problem in advance?

They share an interest in having "fill-in" summer workers available and they share an interest in having a way to get rid of them, also. But nothing is in place here. Dumb.

. . . . . .

I thought this would be an excellent case to get some outside opinions on so I went to a "labor law expert" on the ILR faculty. He answered my question

about the legal status of this "letter of termination" and its relationship to the collective bargaining agreement quite well (at least, from a Union point of view).

He believes the company's actions would be an unfair labor practice, more specifically, a violation of Section 8(a)(5) of the Act, refusal to bargain collectively with representatives of its employees. Even though this letter was signed BEFORE they were employees, its effect was on terms and conditions AFTER they became employees. And THAT is what is important.

He also suggested I look at a case called J. I. Case for more insight into the duty to bargain topic as well as Sears Roebuck. I will.

I will add under Union tactics the filing of an unfair labor practice charge.

I also spoke with another grad. student in this program about this case. His first question was the same as mine: How can this letter of termination be "voluntary" if it is a condition of employment? And what is the legal status of this letter in terms of the collective bargaining agreement or an unfair labor practice?

Unlike the first two cases which had emotional elements, this case is much more technical and calls for outside "expert" help.

. . . . . .

I looked up J. I. Case v. NLRB in my labor law book and it seems to have a lot to say about June, Julie, and August:

"Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the

procedures prescribed by the NLRA looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement."

". . . the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment."

I don't think there is a problem with referring to these documents as "individual contracts," and so this information is very important to the Union's argument. As a matter of fact it seems to prove the company dead wrong.

Now the question becomes what to do with all these employees if they are reinstated. The company would lay them off but they would be on the call back list. It appears, at this point, that the company did not do its homework and it is going to suffer some headaches because of it.

I think the grievance should be expanded to include all the employees affected by this procedure this year. If nothing else, it could be a union bargaining chip.

I'm about 90% done with this one, now. Except for revisions. One thing I did differently this time is I concentrated on the Company theory, analysis, etc. before the Union.

Unfortunately, after my legal expert clued me in to the J. I. Case case, it was very difficult to be optimistic while doing the management side. This is very much reflected in my analysis which is almost totally negative. But since my "big question" was answered; that this pre-employment agreement constitutes an unfair labor practice, there seems to be little hope for victory at arbitration for the company. Dare I say no hope at all?

They need to sit down with the Union and work out a settlement, NOW. And, again, I have to wonder why they did not go to the Union first, explain their idea for summer temporary help, get some union input, and agree to a bilateral plan. Why, why, why?

I have a theory on why the Union didn't go to the company. I'm sure they knew what was going on but I bet they just figured that these "managers" are so arrogant, so wrapped up in their own worth, prejudices, and stereotypes that why should the workers help? "Screw 'em, they never ask our opinion anyway, they just make proclamations from above, so let them hang themselves." This isn't an earth shattering or job threatening situation for the workers, so why not chuckle about it all summer knowing that the company will be paying the lawyers this fall?

This may bring up a question of timeliness for the grievance, but the company doesn't know the union knows and nobody's going to tell them. More

importantly, I don't think the Union can file a grievance until one of these people are let go. Until then they are employees in good standing. I don't think it is wise to grieve what might happen. They could, of course, file the unfair labor practice charge and that would tip their hand.

One thing that is noticeable about both the management and union theories is that they are dryer, duller, not good stories. I think this stems from the technical aspect of the case. You could go on and on about what great workers these ladies are but it really is irrelevant.

. . . . . .

For the first time I've done the bulk of the writing for a case study in Indiana, not Erie. The big reason was there just so much that I have to do that I don't have the luxury of picking my work site as I did with the other cases but it is interesting to see how I do under "office" conditions. It is tougher, harder to keep the concentration up because of all the distractions. One benefit is that I've been around people that I can talk to about the case and I have done that more with this case than with any other. I've talked to the "legal expert," students in our class, and students in the program but not our class. It has been a help but I do see a danger of using others opinions to simply reinforce your own views. You have to be careful about how you pose your questions.

. . . . . .

Back to the quiet lake front of Erie, Pa. Don't ask me why, but my wife, a well established and well paid teacher in the Erie School System accepted a part

time job at Toys R Us for the Christmas season. She's always wanted to work in a toy store. Our son is thrilled.

Any way, we were talking last night and she was telling me about the "tons" of forms she had to fill out yesterday during her hiring process. She estimates between 10 and 15 different documents, many more than one page, many with print as small as that which appears on the case comment sheets. I asked her if she realized what she had signed. She laughed and said she had "no idea about most of it." She described it "like filling out the papers when your new car loan goes through, the person is talking to you but your more interested in figuring out exactly WHERE to sign than you are about what the person or the document is saying." She did vaguely remember to agreeing to "some sort of drug testing if the company wanted to," and "some kind of background check to see if she could be trusted."

The point, of course, being that a college student, thrilled with the job they had just been given could very well sign a letter of termination and not even know it or, at the very least, not have any understanding of its implications.

I down played this aspect in my union theory. Maybe I shouldn't have but it has, sort of, become a cliche'. But as my wife's experience proves again, cliche's are cliche's because the are based in truth, which is , itself, a cliche' . . . . . Break time.

. . . . . .

OK. The similarity between this case and the one we "argued" in class last night just hit me upside the head. Here I've been going on and on about the contractual "voluntary quit" (#2, section 1, article IX) and NOW I see that it is dealing with SENIORITY and that's ALL its dealing with here. Important, but not what I was making it out to be. Time for a revision.

. . . . . .

The revisions are done and this case is almost complete. I've decided I have to include all 18 employees in this grievance. I doubt if anybody left out would really bring suit against the Union but there is always the chance. Anyhow, they were wronged as much as the three named parties.

I've developed one habit that I'm not sure I've mentioned before. As soon as I write the grievance and the response, I immediately write the acceptable settlements for both sides. Of course, at the beginning of the process the grievance and the union's acceptable settlement are the same. Ditto for the management stuff. Then as my analysis changes, so does the acceptable settlements. They become, in a real sense, barometers measuring the ups and downs of both side's case. With the computer I never save the changed versions (I guess I should) I just delete as I go.

I try to keep count. This time I changed the Union settlement four times, starting with full reinstatement, going through partial repayment with reinstatement to partial repayment with layoff to contractual layoff, no payment. I really don't think an arbitrator would award back pay in this case. It was pretty

clear what the intention of the company was, even though they went about it in the wrong way. But I don't see any money coming.

The management's settlement and case did not change that much, maybe twice or three times but the changes were minor. After I got my answer concerning Sec. 8 (a)(5) I didn't hold out much hope for the company.

I would like to see this company pay for their error. It seems individual workers make one mistake and they loose everything, a company makes a mistake and nothing much happens. Not right, not fair, not moral, but definitely American.

I'll let this thing sit and give it a final look in about 24 hours.

. . . . . .

Case three is complete. For the record, I talked to more people about this case than any other. They include our dept. expert, other students in and out of the class, my wife, and the president of our local here in Erie who reinforced strongly my opinion that all these individuals had to be included in this grievance (of course, he is currently running for reelection).

I am certain the Union side is the strongest here and I wonder if I should not demand a better settlement for their side, maybe half back pay or something. I feel, however, that the Union probably wants this episode concluded as much as the company and so they would probably settle for what I stated. Their real

victory is pointing out that the company must bargain with them over wages, hours, and terms and not with employees, even possible temporary employees.

Over all, this case was drier, more technical and, quite frankly, not as much fun to write. I did not see a need for expanding the characters of the three employees, of putting them in the real world. Maybe I could of and should of but because of the nature of this dispute I did not see it as necessary.

The big environmental difference in this case as opposed to the other two is that at this point in the semester we are beginning to enter "crunch time" and each second of the day is important. There was not enough time to sit and think. If I was sitting I had to be doing something else. My duties as a grad. assistant haven't helped either. It will be interesting to see how available time influences my handling of case 4.

I have attached what I call "Fact Sheet 1." As with the last case, I used this to start the thinking process at the beginning of this exercise.

Donald S. McPherson © 1994
University Professor of Industrial Relations
Indiana University of Pennsylvania

A SHELTER IN THE STORM

Pleasantville Township is a suburban/rural municipality of approximately 250 square miles located 30 miles from a large city. The Township and the Municipal Employees Union have had a collective bargaining relationship since 1972. From that date until the current Agreement, the bargaining unit included all regular full-time and part-time Road Department and Sanitation Department employees. After a long, bitter and unsuccessful strike during the negotiations for the current Agreement, the Union agreed to the Township's proposal to eliminate the Sanitation Department in order to allow the Township to contract our garbage collection. To say the least, there is "bad blood" between the Union and the Township, with Local Union leaders convinced that the Township would like to break the union.

The new Agreement became effective last January. In May, the Township entered a contract with Build Bros. General Contracting to construct a total of five picnic pavilions in Memorial, Southmoreland, and Walton Parks and to acquire and install picnic tables and an extensive array of playground equipment in Township parks. The $62,170 project was 50% funded with a state Community Development Block Grant, which made it affordable, and 50% funded from the Township's operating budget. According to the contract, the general contractor was responsible for managing the project, including competitive bidding of materials, and for performing the necessary installation, carpentry, electrical, and concrete work in accordance with specifications.

When the employees saw Build Bros. equipment and employees beginning site preparation, they approached the steward who, in turn, sought out the Township Manager to protest Build Bros. taking the bargaining unit work of Township employees. The Steward claimed that Road Department employees had the skills to do the work required for the pavilions and had done such work in the past and asserted that the Township could not properly subcontract work, especially when regular employees were on layoff. "You should assign current employees who can do the work to the job," the Steward argued, "and then call back laid off employees to do the work of those assigned to pavilion construction." The Township Manager rejected the Steward's protest and the Union grieved.

ADDITIONAL UNDISPUTED FACTS

1. In preparation for the 1986 U.S. bicentennial celebration, the Township contracted with several local building contractors for the construction of a large picnic pavilion in what is known locally as "Storm Park." Officially named Memorial Park, Storm Park is an extensive public park originally constructed 30 years ago on the site of large scale property destruction and loss of two lives from a tornado. P.J. McGuire Carpentry, Slide Electric, and J. Hoffa Landscaping & Concrete constructed the pavilion. The five new pavilions covered in the Build Bros. contract are virtually identical in size and design to the pavilion built in 1986.

2. No Township employees were on layoff at the time the 1986 Storm Park pavilion work was contracted and completed.

3. Six Township employees were on layoff at the time the Build Bros. contract was let, including two former Sanitation Department and four Road Department employees.

4. Article 18,A of the Agreement has remained unchanged for at least the past four agreements.

5. Article 18,B was added in the most recent bargaining to permit subcontracting of garbage and recycling.

6. At least five Road Department employees formerly worked or currently work on the side in various building crafts and Laborers regularly are required to assemble equipment and supplies of various sorts. Road Department employees regularly do various sorts of earth moving, site preparation and landscape work in the course of their jobs using Township heavy machinery. Masonry workers have built cement block walls in various sizes and formats and have poured and finished concrete for Township storage sheds. Road Department employees constructed a concrete block building and erected steel beams to support a storage loft and the roof to house the Township's radio transmitting equipment. Road Department employees ran conduit and electric cable to the site and installed electrical outlets and interior and exterior light fixtures. None of the incumbent or layed off Road Department employees is a certified electrician and none is a general contractor.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE NO. 1 - RECOGNITION

A. The Employer recognizes the Union as the sole and exclusive representative of its employees in a subdivision of the Employer Unit comprised of all full-time and regular part-time road employees, and excluding management level employees, supervisors, first level supervisors, confidential employees and guards.

ARTICLE NO. 4 - JOB CLASSIFICATIONS AND WAGE RATES

1. Road Department: to include working foreman appointed by the Township; drivers, laborers, mechanics, assistant mechanics, heavy equipment operators and masonry workers.

Any operator of the two big rollers, road grader or high lift shall be paid the Heavy Equipment Operators rate of pay for the full day for operating one hour or more.

JOB CLASSIFICATION	HOURLY RATE YEAR #1	YEAR #2	YEAR #3
Working Foreman	$14.12	$14.67	$15.27
Heavy Equipment Operator	13.62	14.17	14.77
Truck Driver	13.28	13.83	14.43
Mechanic	13.70	14.25	14.85
Assistant Mechanic	13.28	13.83	14.43
Laborer	12.86	13.41	14.01
Masonry Worker	13.28	13.83	14.43

* * * * *

ARTICLE NO. 6 - SENIORITY

* * * * *

J. The employees laid off as a direct result of the elimination of the Sanitation Department shall have the right of recall for forty (40) consecutive months from the date of layoff before a break in service occurs as provided in Section H of this Article. Any employee hired after the recall of employees laid off due to the elimination of Sanitation is entitled to only eighteen (18) months of recall.

K. The Employee on layoff status has the right to turn down a temporary job, but must return when a full-time position is offered.

L. All overtime must be offered to the most senior employee. The Township agrees to follow this procedure without fail.

ARTICLE NO. 10 - GRIEVANCE PROCEDURE

* * * * *

C. An Arbitrator shall have jurisdiction only to determine the application and interpretation of this Agreement and may not act on any subject inherent in the budget formulation or policy making authority of the Township.

* * * * *

ARTICLE NO. 18 - SUBCONTRACTING

A. For the purpose of preserving work and job opportunities for the employees covered by this Agreement during the term of this Agreement, the Employer agrees that no work or services of the kind, nature or type covered by, presently performed, or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, assigned or conveyed in whole or in part to any other corporation, partnership, person or non-unit employees, without the consent of the Union, unless otherwise provided in this Agreement or unless such work has been subcontracted by the Employer in the past and then in such event it is agreed that no bargaining unit employee shall be layed off as a result of such subcontracting.

B. For the benefits provided the laid off employees and other benefits granted to remaining employees, the Union shall permit the subcontracting of garbage and recycling, not withstanding the above language referenced in Paragraph A of this Article.

COMMENTS - SHELTER IN THE STORM

1. OVERVIEW: This is a contract interpretation case so the U will bear the burden of proof. U must isolate the factual propositions that will test the meaning of each K provision it asserts was violated and must demonstrate (prove) each proposition with argument/evidence. U must start with (and ER must defend against) Article 18 since ER argues this mutually negotiated provision expressly authorized the subcontracting to Build Bros -- if Article 18 says clearly and unambiguously what must be done under these facts, it must be enforced. The meaning of the language is all-important: it's the entire case.

For example, U must develop meaning for the context of Article 10 (introductory phrase), arguing that it informs the meaning of the remainder of the provision. Then U must develop meaning for "such work" and (1) demonstrate that "such work" has not been subcontracted by the ER before or (2) even if it has been subcontracted in the past, b.u. employees were layed off "as a result of" the Build Bros. subcontracting. Only then can it begin to make arguments based on availability of competent personnel to do work belonging to the bargaining unit.

If the U fails to prove either (1) or (2), it will probably lose. Furthermore, the U must attack the position put forward by the ER regarding the meaning of Article 10 in this instance.

2. You must attend to connecting your various arguments/evidence demonstrations with a particular factual proposition regarding the meaning of the implicated K language. Don't just provide a discursive narrative; don't just provide a list of points. Those points must be proved and their proof must attach itself logically to a consequence: each point demonstrates one of the aspects of the meaning of the language at issue -- cumulatively, all of them "prove" the meaning of the K on these facts.

3. See Grievance Guide, 8th ed, pp 360-61 "In Brief" and "Guidelines" re: subcontracting. Obviously, there are tests here the U would like to employ in its theory of the case. BUT NOTE WELL: 1) these parties HAVE bargained about subcontracting - this is not a silent K; 2) much of the balancing tests described in GG are for use "in the absence of specific contract language." ER will want to argue that such balancing tests are not relevant; since the parties have bargained, the only issue is what their subcontracting language means. ER will also want to argue that any residual issues must be considered in light of Article 10 restrictions on jurisdiction of arbitrator in matters of policy-making or budget formulation and show that this decision falls into the scope of that provision. U will want to argue that even when the parties have bargained about subcontracting, there are still implied limitations on ER's rights arising from the Recognition clause itself and, besides, here the parties have stated a purpose for the subcontracting provisions and that purpose is to preserve work opportunities for the bargaining unit.

4. U: The introductory part ov 18,A is crucial in several respects. First, you want to use it to show that the parties' overall purpose in establishing subcontracting rights was to preserve bargaining unit work and work opportunity. That over-riding purpose must inform any interpretation of the meaning of the clause. Second, because of that over-riding mutual purpose, the fact that b.u. ees were on layoff at time of Build Bros contract is significant in its own right and significant as a component of the meaning of "such work" under these particular factual circumstances. This may be one of the few ways out of your dilemma: to the extent you show that your ees can do that work, you run the risk of showing that it's the same work that was contracted out last time. The U must demonstrate "such work" to be ambiguous and then assert that the scope of its meaning under these particular facts includes the fact that some ees are laid off.

5. ER re: #4: Purpose-shmurpose, the U is obfuscating. Article 18,A is a negotiated and very severe limitation of what would otherwise be a broader ER right to subcontract. Since it is so severely restrictive, those instances in which it grants the ER subcontracting rights must be strictly enforced, otherwise the ER is forced to forfeit rights it negotiated. Art 18,A gives the ER the right to subcontract without the U's consent only in a single circumstances, where "such work" has been contracted out before. This makes the meaning a straightforward matter of fact determination.

6. ER: in light of #5, you must argue that the Build Bros. project is about the clearest example of "such work" one can imagine. The disputed work is precisely the same as the bicentennial project - the pavilions to be built are for all practical purposes identical to the pavilion subcontracted before. The "work" required to build the first one -- which you contracted out -- is the same "work" as here.

7. ER: in light of #5, you must point out that since the work has been subcontracted before, the ONLY further restriction is that the subcontracting out of the work this time may not "result" in any employee being laid off. All ees laid off currently were laid off before the Build Bros. job; there is no way any could have been laid off "as a result."

8. U: You must insist that "as a result" need not be read in cause-effect chronological terms. Had the ER done what you believe the TWP was obligated to do, less (or no) ees would still be laid off -- thus some degree of layoff has indeed occurred "as a result" of this decision, compared with what would have occurred if the ER had done it the U steward's way.

9. ER: the parties demonstrate in numerous places that they are perfectly capable of addressing the interests of laid off employees and of providing for a consideration of the rights of laid off employees. Since the K demonstrates their capacity for dealing with that area, it is significant that there is no language in the K whatsoever suggesting that the meaning of 18,A is dependent on whether or not b.u. employees are on layoff. The parties know how to put in such rights if they wish to; they're not here.

10. ER: on the merits, you need to argue: 1) the b.u. doesn't have a certified electrician and whether or not you have the work done by a certified electrician is certainly a matter of policy (i.e. liability) and therefore unreviewable as a mgt criteria at arbitration; 2) the b.u. doesn't have a general contrator and the decision to invest responsibility in a contractor to deliver all of the work by a specific time and to take on all responsibility for hiring, wage payment, supervision, liability, etc. is, again, a decision in the policy-making area. Similarly, how you utilize your own work force is certainly a Mgt right. They've been hired to work on the roads. Even if you could, if you wanted to, take them off their primary work and have them work on the pavilions, the issue is whether you MUST by contract - the decision to do so or not, from ER's view, is a matter of both policy-making and budget formulation: whether they are available, even if capable, is for you to decide.

11. ER: Don't underestimate the depth of the U's feeling on this matter, even beyond the union-busting overtones. The U will believe strongly that with ees on layoff and b.u. employees having the skill to do the work and that, having done this sort of work before, this is their work.

12. U: Guard against self-defeatism which might lead to a weaker theory being developed than otherwise might be. U has an uphill battle against the language, to be sure -- likely a losing one -- but you are not without arguments and not without a theory that has at least a chance. To role over dead is self-deceptive. Give it the best argument you can.

<u>OUTLOOK</u>: ER's case to lose. The language does carve out a single exception for subcontracting and this project seems to sit squarely in the middle of that exception. If the U puts in less than its strongest case in the face of a vigorous ER case, it will lose. If the U puts in the strongest, most creative case it can and the ER does a less than adequate job of DEMONSTRATING the meaning of the K, the ER stands a chance of losing.

Kate Golding
LR 641
October 20, 1994

A Shelter In The Storm

I. The Grievance

In May 1994 the Township of Pleasantville entered into a contract with Build Bros. General Contractors to build several picnic pavilions, assemble picnic tables, and construct a wide array of playground equipment. The union charges that the contracting out of such work violates violate Article 18 A of the Collective Bargaining Agreement.

Relief Sought:

In accordance with Article 18 A of the current Collective Bargaining Agreement, the union requests that the bargaining unit work that has been contracted out be awarded to township employees.

II. Management's Negative Response:

Pleasantville has not violated Article 18 A of the Collective Bargaining Agreement and was within its rights when it contracted out the pavilion and playground work described in the union's grievance. In 1986, the Township contracted with a private contractor to do work exactly like the work in question. Article 18 A clearly states that management has the right to contract out work that has been contracted out in the past. Therefore, the union's grievance is denied.

III. Union's Best Theory of the Case.

Last January the union entered into a contract with Pleasantville Township after a long and bitter strike.

Unfortunately, to end the strike, the union had to agree to the elimination of the Sanitation Department. The Township then contracted out the collection of garbage. As a result, several union employees were layed off. In May, the Township entered into a contract with Build Bros. General Contracting to build five picnic pavilions in Memorial, Southmoreland, and Walton Parks. The contractor will also acquire and install picnic tables and an extensive array of playground equipment.

When Township employees saw Build Bros. equipment and employees beginning to prepare the site for construction they approached their union steward to voice their objections. Build Bros. employees were performing bargaining unit work! The Union Steward went to the Township Manager to protest. The Steward explained that Road Department employees had the skills to perform the work required to construct the pavilions, could put picnic tables together, and could assemble playground equipment. He went on to explain that Road Department employees had done such work in the past and the Township should assign the work to employees who have the necessary skills and call back employees on lay-off to do the work of those assigned to the park construction. He then reminded the Township Manager that, according to the contract, the Township could not properly contract out work, especially when there were several employees on lay off. The Township Manager rejected the Steward's protest on the spot.

Article 18 A of the Collective Bargaining Agreement clearly states:

"For the purpose of preserving work and job opportunities for the employees covered by this Agreement during the term of this Agreement, the Employer agrees that no work or services of the kind, nature, or type covered by, presently performed, or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, assigned, or conveyed in whole or in part to any other corporation, partnership, person, or non-unit employees, without the consent of the Union...unless such work has been subcontracted by the Employer in the past and then in such event it is agreed that no bargaining unit employee shall be layed off as a result of such subcontracting."

The purpose of Article 18 A is to preserve the work of bargaining unit employees. Management contends that the language should be interpreted in a narrow manner. However, the union contends that the purpose of the Article must be considered when deciding how to interpret the language. The purpose of preserving bargaining unit work demands a broad interpretation because circumstances change. For example, at the time of the previous subcontracting of work there were no Township employees on lay off. If there had been employees on lay off the union would have grieved the subcontracting. However, in the current circumstances there are employees on lay off and it is the current circumstances that must be considered.

The first line of the Article states: "For the purpose of

preserving work and job opportunities for the employees covered by this Agreement during the term of this Agreement, the Employer agrees that no work or services of the kind, nature, type covered by, presently performed, or hereafter assigned to the collective bargaining unit will be subcontracted...". When one considers the language it is easy to see that the intent is to preserve the work of bargaining unit employees. Yet, the Township contracted with Build Bros. General Contracting to do work that Road Department employees clearly have the skills to accomplish. Pleasantville could easily have assigned those Road Department employees who possessed the necessary skills to the park project. There are currently four Road Department employees and two Sanitation Department employees on lay-off who could have been called back to fill in for those that had been assigned to the park project. However, the Township chose to subcontract the work to Build Bros, leaving six Township employees out of work. The union understands that this is a temporary project. However, the Township could have called the layed off employees back to work, even if it was only temporary.

Management's actions are in direct violation of Article 18 A. The Township could easily have assigned the work to Township employees. Such work has been performed by bargaining unit members in the past. Road Department employees often do earth moving, site preparation and landscape work in the course of their jobs. Laborers are often required to assemble equipment and supplies. In addition, Masonry workers have built cement block walls of various types and have poured and finished

concrete for Township storage sheds. Road Department employees have constructed concrete buildings in the past and have erected steel beams to support a storage loft and the roof to house the Township's radio transmitting equipment. Finally, at least five Road Department employees formerly worked or currently work on the side in various building crafts. It is clear that Township employees possess the qualifications to do the work required in the park project. However, the Township Manager has chosen to ignore those facts.

The Township contends that it has subcontracted the work in question in the past and that it therefore, according to Article 18 A, has the right to do so in this instance. However, the work that was subcontracted out in the past was **not** the same as the work in question. The circumstances at the time of the previous subcontracting were entirely different. Perhaps the most important difference is that at the time of the past subcontracting there were no Township employees on lay-off. There were no employees that could be reassigned or recalled from lay-off to assist in the construction. In addition, that work was for the Bicentennial celebration. It needed to be done quickly. The union grants that Build Bros may have a larger number of employees available to work on the current park project. However, the work in question does not need to be done as quickly as the Bicentennial project. Additionally, the previous project was much smaller in scope. The current project is much larger and involves a greater amount of work.

The union also contends that one must consider how the

previous project was handled by the Township. In the previous job the Township acted as the General Contractor. The Township received competitive bids for the project and awarded the work to three different contractors: P.J. McGuire Carpentry, Slide Electric, and J. Hoffa Landscaping and Concrete. Therefore, since it acted as General Contractor in the past, the union questions why it cannot do so in the current project. As we have shown above, Township employees are clearly qualified to do the work required for the current project. If the work was split between several contractors in the past, it could have been split again with at least some, if not all, of the work assigned to Township employees. In addition, if the Township's contention that it does not have the manpower to manage the current project is true, it could have hired a consultant to manage the project and used Township employees for the actual construction and assembly required for the job.

As was stated above, there are currently six Township employees on lay-off. The contract clearly states "...it is agreed that no bargaining unit employee shall be layed off as a result of such subcontracting." The union argues that if the employer had not subcontracted the work to Build Bros. those employees would have been called back to work, either to work on the park project or to fill in for other employees assigned to the park project. If the Township had abided by the contract, after they decided to engage in such a project they would have decided which Township employees to assign to the project. To replace those employees that had been reassigned, they would have

called all or some of the layed off employees back to work. However, since the work was subcontracted that scenario did not take place. Thus, the subcontracting of the work to Build Bros. has resulted in the continued furlough of Township employees that otherwise would have been called back to work.

The union contends that the contracting out of work that Township employees are qualified to do not only violates Article 18 A, it also further damages union-management relations. Relations were already strained after the recent strike and elimination of the Sanitation Department. Now, the Township expects the union to accept the contracting out of bargaining union work without a fight! The Union contends that the Township is engaged in an effort to continuously reduce the work assigned to members of the union. This is obvious when one considers management's efforts to increasingly subcontract work to outside contractors, whether it be the collection of garbage or the construction of pavilions and park equipment. The work should be assigned to Township employees that have the skills to do it and those employees on lay-off should be called back to fill in for those that will be reassigned.

The union further contends that this matter is within the arbitrator's jurisdiction under Article 10 C of the collective bargaining agreement. The decision to contract out is not part of the Township's budget formulation and policy making authority. If it were there would be no need for Article 18 A. If the Township was free, under its budget formulation and policy making authority, to contract out the work of the bargaining unit

without being subject to an arbitrator's jurisdiction there would be no need to include a preclusion from contracting out in the contract. Further, the Township could subcontract any or all of the work of the bargaining unit and the union would have no recourse. Article 10 C clearly states, "An Arbitrator shall have the jurisdiction only to determine the application and interpretation of this Agreement...". Article 18 A is part of the agreement and it clearly addresses the issue of contracting out bargaining unit work. Therefore, because it is part of the agreement the arbitrator has jurisdiction to rule on the matter. The Township's interpretation of subcontracting falling into its budget and policy making authority is erroneous. If contracting out fell into the reserved authority of the Township it would not have been addressed in the agreement. The Township and the union have bargained over everything that is in the agreement and have both agreed to the current contract. The subject of contracting out is covered in Article 18 A. Therefore, the subject has been bargained over and both parties have agreed to the language. The union contends that subcontracting is not a reserved right of the Township. It has been addressed in Article 18 A and is therefore under the jurisdiction of an arbitrator as provided under Article 10 C.

Management's Theory of the Case

The Township contends that it was within its rights when it subcontracted the construction of five picnic pavilions and the acquisition, installation, and assembly of picnic tables and park equipment to Build Bros General Contracting. According to

Article 18 A, the Township is not permitted to subcontract out work **"unless such work has been subcontracted out in the past and then in such event it is agreed that no bargaining unit employee shall be layed off as a result of such subcontracting".** The union contends that such work has not been subcontracted out in the past and that the subcontracting in this case has resulted in the lay off of bargaining unit employees. Those contentions simply are not true. In 1986, the exact same work was subcontracted to several local building contractors in preparation for the Bicentennial Celebration. Those local contractors built a large picnic pavilion exactly like the ones we have subcontracted to Build Bros. Further, the language of Article 18 A says that management may contract out work that has been contracted out in the past provided it does not result in the lay off of bargaining unit employees. The subcontracting of the park project has not resulted in the lay off of bargaining unit employees. The employees on lay off had been layed off prior to the subcontracting in question. Their lay off has nothing to do with the park project.

The union also contends that the circumstances of the previous subcontracting were different. It charges that the work was on a smaller scale and that it needed to be done quickly for the celebration. Management contends that it does not matter whether the size is the same. What matters it that the **work** for the Bicentennial Celebration and the **work** for the current park project is the **same**. The pavilions that Build Bros. was contracted to build are exactly the same as the one built for the

Bicentennial Celebration. Management further contends that the time table involved with the current project is not for the union to decide. The time table involved in Township projects is part of the policy and budgetary rights reserved to management. Therefore, the union contentions that the work in question does not fit in to the definition of "such work [that] has been subcontracted by the Employer in the past" are erroneous. The work in question, regardless of the circumstances, is exactly the same and therefore does fit the definition of "such work".

The Township does recognize that union-management relations have been damaged since the last strike and the elimination of the sanitation department. However, the state of union-management relations cannot dictate how we will make our construction decisions. The contract with Build Bros. includes not just the acquisition, installation, and construction of park pavilions and equipment, but also includes the managing of the project which included the tedious task of receiving competitive bids. The Township neither has the time nor the employees to engage in such management and bidding selection. If we were to have assigned the work in question to Township employees we would have had to reassign management employees from important jobs to the management of the park project. We do not have the manpower to do that and we cannot afford the time that would be lost from other projects. Therefore, it was only logical to subcontract the project to an experienced general contractor.

The Township chose to subcontract the work not out of an intention to undermine the union. We chose to subcontract the

work because it enabled us to plan the project in the most efficient manner possible. If we had assigned the work to Township employees it would have been much more difficult to establish a date by which we could guarantee completion. The employees that the union claims could have been reassigned have specific functions for which they have been hired. For example, one of the responsibilities of Road Department employees is the maintenance and repair of roads. If, for example, we had severe weather that caused damage to Township roads during the course of the park project we would have to stop work on the project and assign workers to repair the roads. We cannot predict factors, such as severe weather, that could delay and adversely impact the park project should we assign the work to Township employees. By using an outside contractor we can have reasonable assurance that the project will be completed by the date we specify and if it is not we will have contractual recourse at our disposal. The use of a general contractor allows the Township to set a date of completion and have a reasonable expectation that the project will be completed on time.

The union has argued that the Township should have hired a consultant to be responsible for the managerial functions of the project. However, the union fails to realize that a consultant cannot be in more than one place at a time. The project involves three different parks. It is entirely possible that the three parks will be under construction simultaneously. Using a general contractor allows that to happen. The use of Township employees would make that very difficult for a variety of reasons. First,

as we mentioned above, a supervisor can only be in one place at a time. In addition, three simultaneous work sites would demand a larger amount of employees to be reassigned. The Township doubts that it has enough current employees that possess the necessary skills for the project to assign to three different sites. It is the Township's responsibility to engage in policy making and budgetary functions. How the project will be accomplished, the time table involved and the total cost were all factors in the decision to subcontract the work. Management contends that those factors fall into the policy making and budgetary responsibilities of the Township and are therefore not a concern of the union.

In addition, the use of a general contractor enables the Township to save money. We will not have to pay Township employees overtime in order to get the project done in a reasonable amount of time and it also enables us to set a reasonable deadline for completion of the project. As was stated above, in order to manage and complete the project we would have to reassign both management and union employees from other important projects. Such reassignment could result in overtime payments, thus increasing the costs of the project. By using an outside contractor we can control the cost and not have to be concerned with overtime. The contractor has agreed to do the project for $62,170.00. How the contractor accomplishes the task for that amount of money is not the Township's concern. If overtime is involved, the contractor must incorporate it into the contracted price of $62,170.00. Thus, subcontracting allows the

Township to control costs.

The union has argued that a variety of Township employees possess the skills to perform specific aspects of the job. However, management argues that the Township employees do not possess many of the skills required in the project. The pavilions must be designed and built to specifications. For example, a few Township employees may have the skills to pour concrete, but they may not possess the skills to read blue prints, to determine exactly how much concrete will be needed for each pavilion, and to ensure that the walls and supports are level. The project requires more than just a few specific skills. A variety of skills will be required. Build Bros. is an experienced general contractor that can perform all of the necessary functions required for the project. Township employees at best only possess a few of the skills required to complete the project. The union argues that we could split the project and award some of the work to Township employees. However, the union fails to consider that policy making and budgetary decisions are rights that have been reserved to management. Splitting the project would involve problems with accountability, cost projections and management of the project. It simply is not feasible.

Article 18 A clearly gives the Township the right to contract out work that has been subcontracted in the past. In 1986 the Township contracted out work that was exactly the same as the work in question. Therefore, according to the contract, management was within its rights when it subcontracted the work

to Build Bros. General Contracting. Further, the Township contends that this is not a matter that is in the jurisdiction of an arbitrator to decide. Article 10 C states:

> "An Arbitrator shall have jurisdiction only to determine the application and interpretation of this agreement and may not act on any subject inherent in the budget formulation or policy making authority of the Township".

The Township has the right to decide what projects it will engage in, how such projects will be accomplished, and how they will be financed. Therefore, the Township argues that the decision to contract out the park project falls into the policy making and budget formulation rights over which an arbitrator has no jurisdiction. As such, the Township argues that it was within its rights under Article 18 A when it decided to contract out work that had been contracted out in the past. In addition, the Township argues that an arbitrator does not have the jurisdiction to rule on this matter under Article 10 C of the current contract.

IV-A. UNION BATNA: What Must We Prove to Win?

The union's case depends on its ability to persuade the arbitrator that its interpretation of Article 18 A is the correct interpretation. The outcome will depend on whether or not the arbitrator agrees that the purpose of Article 18 A is to preserve the work of bargaining unit employees and should be interpreted in that light. The union must convince the arbitrator that, in light of the purpose of preservation of bargaining unit work, the

language of Article 18 A should be interpreted to preclude the contracting out of work that Township employees have either done in the past or possess the skills to do. Management will probably argue that the language should be interpreted narrowly. The crux of their argument will probably rest on the part of the Article that gives management the right to subcontract work that has been contracted out in the past. Therefore, the union must downplay that issue and do everything it can to differentiate the work in question from the previously subcontracted work. The union must also persuade the arbitrator that the subcontracting of the park project has resulted in the lay-off of Township employees, thus violating Article 18 A. Once again, to accomplish this task the union must convince the arbitrator that Article 18 A must be interpreted broadly. The union must persuade the arbitrator that the contracting out of the park project has resulted in the continued furlough of Township employees, thus violating Article 18 A. In addition, the union must convince the arbitrator that the he or she does have jurisdiction to rule on the matter because it does not fall into the budget formulation or policy making authority of the Township.

In the union's theory of the case they gone a long way in accomplishing those objectives. The union's arguments that the intent of the Article is to preserve the work of the bargaining unit are fruitful. In addition, the union has done an effective job of showing that bargaining unit employees possess the skills required in the park project. However, a stumbling block for the

union is the fact that work that was very similar, if not exactly the same, was contracted out in the past without a challenge from the union. The language of Article 18 A does give management the right to contract out work that has been subcontracted in the past provided that it does not result in the lay off of Township employees.

The union does make some good arguments that the work in the park project is different from the Bicentennial project. The issues of lay off, size, time table, and handling by the Township are a good effort, however, most of those arguments fall into management's reserved rights area and therefore are not entirely persuasive. Therefore, the difference issue could still present a problem for the union. The union's argument that the Township could have hired a consultant is also an interesting idea, but once again falls into management's policy, planning and budgetary rights category. Finally, the union argument that the continued furlough of Township employees is a direct result of the subcontracting of the park project and therefore violates Article 18 A is an effective argument and the arbitrator may find it persuasive.

As stated above, the main obstacle for the union is the fact that work that was essentially the same was successfully contracted out in the past by the Township. The language of the Article does give management the right to subcontract work that has been contracted out in the past provided it does not result in the lay off of bargaining unit employees. While there were no lay offs that directly resulted from the subcontracting in

question, there were workers on lay off that conceivably would have been called back had the work been assigned to Township employees.

The union must convince the arbitrator that the language requires interpretation. The Township will probably argue that it does not need interpretation and should be applied as it was written, without consideration of its intent. Since the Township will probably be arguing for direct application of the contract language and the fact that work of essentially the same nature was successfully contracted out in the past, the Township has an advantage. The union's arguments are persuasive, but they have not completely discounted the Township's arguments. Therefore, this case could go either way. The Township definitely has the advantage. The Township has also presented a good argument that the arbitrator does not have jurisdiction over this matter. However, the union has made an effective counter argument and the arbitrator will probably rule that he or she does in fact have jurisdiction.

This case is very important to the union because it involves the contracting out of bargaining unit work. One of the most important functions the union has is to protect the work of the bargaining unit. While the outcome of the case is uncertain there is really no way to accept anything short of the Township giving the work to the members of the bargaining unit. The outcome of the arbitration is uncertain, however, we do have a chance of winning at arbitration.

IV-B MANAGEMENT BATNA: What Must We Prove to Win?

Management must persuade the arbitrator that its interpretation of Article 18 A is correct. Essentially, that requires management to persuade the arbitrator that the work involved in the park project is the same work as was contracted out in the Bicentennial project. If management can persuade that arbitrator that the work in question meets the definition of "such work" that has been contracted out in the past it will go a long was toward winning this case. The Township has chosen to interpret the language in a narrow manner and it must convince the arbitrator to do so as well. The union will probably argue for a broad interpretation that considers the purpose of the agreement. Management's best case in one of direct language interpretation. Article 18 A gives management the right to contract out work that has been subcontracted in the past provided that it does not result in the lay off of bargaining unit employees. Therefore, management must convince the arbitrator that the work in question was subcontracted in the past and that the current contracting out did not result in the lay off of bargaining unit employees.

The Township does an effective job of arguing that the work in the park project is the same work as was contracted out in the Bicentennial project. Management effectively counters the union's arguments that the work was different because the circumstances were different by emphasizing that the work was the same and that it is the work, not the circumstances, that is in question. The union argument that the subcontracting indirectly resulted in the continued furlough of Township employees is a

good one. However, management effectively counters that argument by concentrating on the contract language and emphasizing that the workers were layed off prior to the subcontracting of the park project. Therefore, their lay off was not due to the contracting out of the park project. The union's arguments that one must consider the intent of the Article are good efforts, however, the language of the contract is on our side. The union has an uphill battle in this case because it must convince the arbitrator that Article 18 A requires interpretation. We, on the other hand, must only persuade the arbitrator to apply the language as it is written.

The Township also makes some effective arguments that help to justify the decision to subcontract the work. Explaining to the arbitrator that the decision was made for practical reasons and not because of a plot to undermine the union is and effective strategy. The Township has also done an effective job of arguing that the decision to contract out was a policy and budget decision that is none of the union's concern. If the case does go to arbitration the Township should first argue that the arbitrator does not have jurisdiction to render a decision in this matter under Article 10 C.

While we have a strong case, a favorable ruling in this case is not a sure thing. However, when one considers the merit of the arguments the Township has made and the language of Article 18 A, our chances are very good at arbitration. The stakes are high because if we are forced to give the work to Township employees we will probably be sued by Build Bros. The financial

ramifications of such an outcome would be devastating. However, out chances of winning at arbitration are very good and given the fact that the union will probably accept nothing short of an award of the work, we should, if necessary, take the case to arbitration.

V. BATNA Tactics: Can the Other Party's BATNA Be Changed?

Union:

The union may want to start a campaign to try to gain the sympathy of the public. It could start a letter to the editor campaign or take out ads in the local newspaper to let the public know that there are Township employees that have been layed off and who could have been called back to work if the Township had not violated the employment contract. It will probably want to emphasize the plight of the layed off workers and their families. In addition, the union could emphasize the fact that the Township forced union to accept the contracting out of garbage collection and that now it is trying to force the union to accept the loss of more bargaining unit work. The union could portray the situation as a fight to try to protect the jobs of hardworking, taxpaying members of the community. It could also emphasize its belief that the Township is trying to break the union. If the community has a lot of unionized workers this could help to gain their sympathy.

Management

Management could also engage in a campaign to try to win the support of the public. It could let the public know that the Township subcontracted the work in an effort to keep costs down

and make the most effective use of the taxpayer's money. It could also portray the union as a trouble making, greedy organization that does not care about the costs to the taxpayer.

The Township could also propose joint labor and management committees to help to improve labor-management relations. Such an action could signal a willingness on the part of management to improve labor-management relations and diffuse the belief that the Township is trying to break the union.

VI. Identifying and Articulating Interests

Union

It is in the union's interest to protect the work of the bargaining unit and to limit subcontracting as much as possible. It is also in the union's interest to try to get its layed off members back to work both for two reasons. First of all it wants to portray itself as a caring and responsible representative of the employees. It wants to show the workers that it will fight to keep their jobs and it they are layed off that it will fight to get them back to work. It is also in the union's interest to get its layed off employees back to work because the more members it has working the more dues it can collect.

It is also in the union's interest to ensure that the collective bargaining agreement is fairly and adequately enforced. However, it is also in the union's interest to improve labor-management relations. The last strike caused damage to the relationship and it is in the union's interest to try to improve the situation.

Finally, it is in the union' interest to avoid costly

arbitration proceedings whenever possible.

Management

It is in management's interest to retain as much discretion and rights as possible. Therefore, it is in the Township's interest to be able to subcontract work if it so desires. Management's right to subcontract work is limited by the current agreement and it is not in its interest to have it limited even more by an unfavorable arbitrator's decision. In addition, it is in the Township's interest to be able to make contracts with outside contractors when necessary and not have to worry about being dragged into court for breech of contract.

However, it is also in the Township's interest to maintain a good public image and does not want to appear to be a monster that enjoys laying people off. In addition, it is in the Township's interest to improve labor-management relations with the union. The last strike greatly damaged the relationship with the union and the Township does not want to go into the next negotiations with an angry union. Finally, it is in the Township's interest to avoid costly arbitration proceedings whenever possible.

VII. Shared Interests

Both the union and management work for the taxpayers and therefore want to maintain a good public image. To this end it is in both of their interests to appear as hard working, efficient, and cost effective civil servants. In light of the growing negative public sentiment regarding public employees, neither party wants to appear to be wasting taxpayer money

fighting instead of working, especially after the recent strike. In addition, it is in both of their interests to improve labor-management relations that have been damaged since the strike. Finally, it is in both of their interests to avoid costly arbitration proceedings if possible.

VII. Prospective Acceptable Settlements

Union

Given the fact that the interest involved is so vital to the union and that there really is no middle ground to be reached the union must consider this an all or nothing case. Therefore, if no settlement in the union's favor can be reached the case should be taken to arbitration.

Management

While the consequences would be devastating should we lose at arbitration, our chances of winning are very good. We have already entered into the contract with Build Bros. and therefore are not able to award all or part of the work to the union. Therefore, considering the fact that we will probably win at arbitration, we feel that if need be, arbitration should be pursued.

Kate Golding

Case Log for **A Shelter in the Storm**

My initial response to the case was that the union was a sure loser. It was difficult at first for me to formulate any viable arguments for the union to pursue. It was very frustrating because I had no idea how to argue for the union. However, after the class discussion of the case and discussing the case with Dr. McPherson I felt that I could make some credible arguments for the union.

As I worked through the case my attitude towards the union changed in that while I still thought they would probably lose at arbitration, I thought there might be a slim chance they could win. I think that I began to feel this way after I discussed the case with Dr McPherson. After discussing possible avenues to pursue and outcomes I felt that the union at least had some chance at arbitration.

As I revised portions of my case I think that both side's arguments got stronger. However, I hit a major stumbling block when I came to the acceptable settlements part of the case. I had no idea how to settle the case because I felt that both sides would consider it an all or nothing situation. I did not want to suggest that the union drop the case because I felt that they at least had a chance of winning. In addition, if they dropped it they would accomplish nothing. I came across the same situation when considering settlements for management. I knew that management had already entered into the contract with Build Bros.

and could not get out of it. While it would be devastating to the Township if they lost at arbitration, I felt that the chances of winning were so good it was worth the risk. I'm not sure I handled that part of the case correctly, but I could not think of any way to settle it.

I am confident about every part of the case except my Acceptable Settlements. I thought about consulting Dr McPherson, but I also felt that I should try to resolve it on my own. I talked the case over with several classmates and still could not come up with what I thought were any viable settlements.

As I worked the case through I began to be more confident about both theories. I chose to do each section individually because I did not want to get too caught up in one side or the other. I knew that if I did the management part all at once that I would have even more trouble developing my union theory.

I started the case early because I feel that I do my best work when I am able to edit it and take time to think everything through. I also wanted to start early so that I could consult Dr McPherson with my concerns over my union theory.

Overall, I am satisfied with my case. I still have concerns about my settlements so I am looking forward to getting the case study back to see if I was wrong. However, even if I was, I think that I learned from the exercise and gave it a good effort. It was much more frustrating for me than the last case. I had to argue the contract language and I found that to be difficult at times. However, once I got started and resolved my problems with the union theory the case was not as difficult. All in all, I'm

glad the case is over, but I can't wait to get it back so I can see how I did.

Donald S. McPherson
essor of Industrial & Labor Relations
Indiana University of Pennsylvania
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CRAMER V. KRAMER

John Cramer, who is black, is employed by the Housing Office of Metropolitan Eureka (HOME), a regional public housing authority. Cramer has worked at Candlestick Terrace, the region's largest public housing project, for 26 years, beginning as a general maintenance man. His current position is GENERAL MAINTENANCE CLERK, a job to which he transferred in 1977. His hourly wage is $8.98, established by scale in the currently-in-force collective bargaining agreement between HOME and Service Employees Local 6.

Cramer's duties at Candlestick Terrace include: taking routine maintenance calls from the resident manager's office; writing maintenance slips; dispensing maintenance slips to the "work boxes" of the various craftspersons (carpenters, plumbers, etc.); expediting emergency maintenance calls received from the office by directly contacting the appropriate craftsperson; calling in the payroll and absence report each morning; logging in all completion forms for routine or emergency maintenance jobs completed; and ordering maintenance supplies. He cannot type and is not a supervisor. He is the sole maintenance clerk at Candlestick Terrace.

Angelina Kramer, who is white, has worked for HOME for five years. She was hired as a RELOCATION MAINTENANCE CLERK in the central HOME Office. From shortly after she was hired until two years ago, all of the personnel in her division, "Relocation," were HOME employees, but were under contract to the federal Urban Redevelopment Authority. HOME secured a URA grant to run its relocation operations and all those working in that division were HOME employees but in fully federally-funded positions. The Relocation division was responsible for the administration of all moves within HOME's housing units and handling all the relevant paperwork, billing, etc. Within the Relocation division, the maintenance operation was responsible for checking vacant apartments before new occupants arrived and carrying out needed cleaning, maintenance, and repainting.

About two years ago, the federal grant expired and was not renewed. Using its own budget, HOME was able to pick up on its regular payroll 10 of the 18 employees in the URA-funded Relocation division operation. The remainder were furloughed. Kramer was amoung those whose jobs were assumed by HOME, which continued a scaled-down Relocation operation.

Kramer's position has always been Relocation Maintenance Clerk. Her current wage is $9.49 per hour. When Kramer was first employed five years ago, her position, like all other new URA-funded positions, was announced as a vacancy subject to the contractual bidding procedure. Cramer was eligible to bid on the job but did not. He says he doesn't recall being aware of the bid notice when it was posted, but does not dispute that it should and could have been posted on the bulletin board at Candlestick at that time.

Kramer's duties include: taking routine maintenance calls from the central Relocation division office; writing maintenance slips; dispensing these slips to the "assignment folders" of the various Relocation division craftspersons; expediting emergency maintenance calls received from the Relocation division office by personally contacting the appropriate craftsperson(s) and "staying on top of the job;" estimating the cost of maintenance jobs using the "master control card" for all property and the hourly wage of the craftsperson; entering the final repair costs on in the maintenance log; calling in the payroll and absence report each morning; recording the completion of all maintenance jobs; and ordering maintenance supplies.

Kramer works in a central division servicing all three apartment complexes when new tenants come into vacancies. The cost estimates which Kramer completes were initiated originally because of requirements of the URA grant. When the grant ended, HOME could have modified the procedures but we was still required to keep records on everything that had been purchased with federal funds. Thus, it seemed efficient just to keep the same system in place. Kramer can type and generally types the forms and records she uses, but is not required to do so. She is not a supervisor and she is the sole Relocation Maintenance Clerk for HOME.

Kramer is a high school graduate; Cramer completed 10th grade. The salary of Cramer's position was determined by a scale in effect since anyone can remember, adjusted periodically for inflation. The salary of Kramer's position was initially bargained based on minimum scales provided from URA when HOME first got the grant and it has similarly been adjusted for inflation through contract provisions since then.

HOME jobs with "Clerk" titles and their current hourly rates are: Clerk Typist I ($7.37); Clerk Typist II ($8.06); Finance Clerk ($8.16); General Clerk ($8.21); Annual Review Standards Clerk ($8.46); Accounts Payable Clerk ($8.61); General Maintenance, Inventory, Storeroom, Distribution Clerks, Machine Operator, Non-Expendable Inventory Controler (all $8.98); Relocation Maintenance Clerk ($9.49); and Maintenance Clerk-Technical ($9.79).

About a month ago, Cramer was told by another employee that Kramer does the same job but makes substantially more money. Cramer met with his superior, determined that it was true that Kramer makes more per hour than he does, and complained. When his complaint was rejected, he filed a grievance charging racial discrimination.

Donald S. McPherson
essor of Industrial & Labor Relations
Indiana University of Pennsylvania
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AN EVOLUTIONARY DIFFERENCE

Background

The "Evolution of Man" exhibit, which takes up an entire floor, has become very popular as a tourist draw for the Museum of Natural History. On most weekdays, the exhibit need not be fully staffed but on weekends, especially Saturdays, the crush of people has been overwhelming and full staffing is essential.

Dick Leekey is the senior curator in the Exhibits Management department and he works with the Evolution of Man exhibit. Last Saturday was his birthday and he requested earlier in the week according to the usual procedures to work Saturday, given the staffing needs. Leekey was already scheduled to work five days (Monday thru Friday) that week.

Instead of assigning him to work the Saturday his Supervisor, Jane Goodall, denied his request and declared a "short vacancy." She then assigned an Exhibits Technician (ET) from another department, who has worked in short-term assignments as a curator in the past and was qualified to do the work, but who is currently in a different classification. This employee was scheduled to work Saturday at his own job in his own department anyway, so Goodall got permission from higher supervision to have him reassigned and directed to do Leekey's job instead of his own.

Leekey was very angry and said he would file a grievance. No can recall these circumstances arising in the past and, as far as anyone knows, there has been no comparable dispute in the past.

Pertinent Contract Provisions

ARTICLE II

Section 4

In the exercise of its inherent authority, Management has full authority to schedule and direct the work force except as modified by this Agreement.

Section 8

No provision of this Agreement is to be interpreted as a guarantee of any number of hours of work or days of work in any given period.

ARTICLE VIII

Section 2

Short vacancies of less than 30 days duration may be filled without posting at the option of the Department Head.

ARTICLE XXI

Section 3

An Overtime rate of 1.5 times the normal straight time rate shall be paid for all work in excess of eight hours per day or 40 hours per week.

Section 6

There shall be eight paid Holidays per year. Holidays taken as vacation days shall be paid at straight time. Holidays worked shall be paid at 2.5 times the normal straight time rate. The paid Holidays include the following:

* * *

C. Birthday Holiday: An employee shall have one day off with pay on the day of his birthday and the right to refuse to work on that day if requested by Management. If the birthday falls on the same day as another paid holiday, the day shall be paid at the combined rate.

Donald S. McPherson
ssor of Industrial & Labor Relations
ndiana University of Pennsylvania
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GIT ALONG, LITTLE DOGIE

Background

On January 27, a Tuesday, four clerks in the Data Operations Group (DOG) were asked by their supervisor to work 4 hours overtime on each of the next two days. Two clerks were not requested to work overtime. No one had any overtime in the office for the year to that time. The clerks were told they had to do a rush job getting together the Budget proposal for the next fiscal year by Friday morning.

In the six previous times that overtime has been assigned since this contract language was adopted two years ago, overtime was always distributed among all those employees occupying the job in question. This procedure was also followed prior to unionization.

When Janice Smedley, one of the clerks not asked to work the overtime, saw the schedule posted on Monday afternoon, she asked the supervisor, Dumbarton "Dum" Oakes, why the overtime was distributed equally. He replied that there was no need to equalize overtime for every assignment and he chose the best qualified personnel for this particular job, which required a high level of cooperation and efficiency because of the tight deadline. Janice told him that was a "typically Dum" decision and that she would file a grievance since she and her co-worker, Algernon Swinburne, were just as qualified as those who had been asked to work.

Additional Undisputed Facts

A. All six clerks had achieved a "Very Good" overall rating in the most recent Annual Performance Review just completed in December. In fact, they are the only six clerks in the Division to have achieved a rating that high.

B. All six clerks are assigned permanently to the jobs in question and all are in the same job classification.

C. Each performance criterion in the Annual Performance Review can be rated "Very Good;" "Good;" "Satisfactory;" "Needs Improvement;" or "Unsatisfactory" and within each of these ratings are three possible levels (High/Medium/Low). For the individual performance criteria, the six DOG clerks had differing, individual ratings even though each achieved an identical, medium "Very Good" on the summary, "Overall" rating.

D. On criterion #4, Ability to Get Along With Others, Smedley was rated a High "Good" and Swinburne a Low "Very Good." Each of the four chosen for overtime was rated at least a Medium "Very Good" on this criterion.

Relevant Contract Provisions

Article VI, Section B Management Rights

Nothing in this Agreement shall restrict the Employer in exercising its right, to direct employees; discipline employees for sufficient cause; maintain the efficiency of government operations; and determine the methods, means, and personnel by which such operations are to be carried out.

Article XV, Section A Overtime

Authorized overtime will be distributed equitably among the best qualified employees to perform such work. First consideration for overtime will be given to those employees who are currently assigned to the job classification in question.

Donald S. McPherson
sor of Industrial & Labor Relations
diana University of Pennsylvania
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. . . LIKE A HORSE AND CARRIAGE

Background

Teacher Maria Didactica and Grievant Imogene "Ima" Weiner both began employment in the School District on the same day and have been employed by the District for three academic years. Didactica had always been listed immediately ahead of Weiner on the official Seniority List as the result of a casting of lots following the tie-breaking provisions of the Agreement.

Didactica was granted one day of unpaid leave on Monday, November 7, by the District Superintendent, Dr. James Precentor, for the purpose of a short honeymoon camping trip to Niagra Falls. She was married on Saturday, November 5. No adjustment in Didactica's seniority was made as the result of the leave.

As provided for in the Agreement, the Seniority List was circulated to all employees on December 15, at which point Weiner learned for the first time that she had not jumped ahead of Didactica in seniority as she had assumed she would. The Agreement provides that the list will be circulated once each year in the Fall semester and that employees shall have 10 days following the release of the list to file any grievances related to placement on the list.

Weiner asked for a meeting with the Superintendent on December 16 and inquired about "the error" in her Seniority List placement. Dr. Precentor replied that there was no error. In his view, the leave to Didactica was a short-term, unpaid "administrative leave" within his authority to grant and not requiring Board of Education approval. As a result, no alteration in seniority was required. At the conclusion of the meeting, Weiner told Precentor she would be filing a grievance.

Additional Undisputed Facts

A. The District is a small, rural, and financially distressed. Of the five teachers listed below Didactica and Weiner on the Seniority List, all have been furloughed at least once in the last three years. Only one of these was actually laid off, and he only for one semester. Furloughs were announced for the other two at the time of budget adoption in early summer but taxes were increased and the teachers were reinstated prior to the beginning of the school year.

B. Superintendent Precentor has granted five short, unpaid leaves of absence in the past four years for which no seniority adjustment was made. In each case, the employee had already used his or her Personal Day at the time the request for leave was made.

Teacher	Leave Duration	Purpose
O'Donnell	1 Day	Marriage & Honeymoon
Strahan	1 Day	Personal Travel
Troup	1/2 Day	Personal Business
Primo	1 Day	Accompany Spouse on Business Trip
Smith	2 Days	Accompany Spouse on Business Trip

C. Precentor never informed the Union of the granting of such leaves and felt he was under no requirement to do so since he was acting within the scope of the District's rights. No grievances were filed regarding any of these leaves.

D. The grievance arises in the third year of a four-year Agreement. Article XII, Section C was drafted by the District and appears in the current Agreement for the first time as a new item. There was virtually no discussion of its implications during negotiations. The District offered the language as a clarification and it was readily agreed to by the Association without comment.

E. Article XIX, Sections H and I were drafted by the Association and have remained unchanged for the past four Agreements.

Pertinent Contract Provisions

Article II Responsibilities and Rights of the Board

The Board of Education, on its own and on behalf of the electors, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State, and of the United States, including, but without limiting the generality of the foregoing, the right:

1. To the executive management and administrative control of the school system and its properties and facilities, and the job related activities of its employees except as specifically limited by this Agreement.

2. To discipline, discharge, or reduce in rank or compensation, professional employees for cause.

* * * * *

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of the Constitution and laws of the State, and the Constitution and laws of the United States.

Article XII Seniority

A. Definition - Seniority shall mean the length of service from the employee's first day of work as a temporary professional employee or as a professional employee following the most recent date of hire.

B. Break-in-Service - An employee's seniority shall be lost and an employee's name shall be removed from the seniority list by any of the following: 1) retirement; 2) resignation; 3) discharge for cause; 4) failure to report from furlough or suspension within five (5) days.

Provided, that if an employee is reemployed by the District within one year after the date of the break-in-service, the employee's previously earned continuous service shall be reinstated and that the employee shall not be entitled for credit for the period between the date of the break-in-service and the date of reemployment.

C. Leaves of Absence - The taking of any unpaid leave of absence under the provisions of law or of this Agreement does not constitute a break in service, but no credit for seniority purposes for the period of time of such leave and any extensions or renewals thereof will be given except if required by law. The employee's seniority accrued at the time the leave commenced shall be restored upon return to service.

* * * * *

H. Unpaid Leaves of Absence

1. Association Leave - A leave of up to one year shall be granted by the Board to one (1) professional employee per year,, provided, the professional employee has a minimum of five (5) years of service in the District, for the purpose of serving as an officer of the Association or on its staff.

2. Health Leave - A professional employee who is unable to perform his or her regular duties because of personal illness and who has exhausted all available sick leave days may be granted a leave of absence without pay by the Board for a maximum period of one year from the date of the exhaustion of such benefits.

3. Maternity Leave - A female professional employee who is pregnant shall have the option of applying to the Board for an unpaid Maternity Leave commencing during her pregnancy. An employee's right to return shall extend only to the beginning of the third (3rd) semester after commencement of the leave, provided that the employee may return at the beginning of either of the intervening semesters. On returning to service, the employee will return to the position she vacated if it is still in existence or otherwise to a similar position. This leave shall not constitute a break in service for seniority purposes.

4. Parenting Leave - An unpaid leave of absence shall be granted by the Board to an employee for the purpose of providing parental care to that employee's newly born or newly adopted child residing with the employee, providing that the leave shall not extend for more than three consecutive semesters beginning with the semester in which the leave is granted.

5. Professional Study - A leave of absence of up to one (1) year shall be granted by the Board to a maximum of two (2) professional employees per year, providing the employee has a minimum of five (5) years service in the District, for the purpose of engaging in fulltime study reasonably related to his or her professional responsibilities at an accredited college or university.

6. Extensions and Renewals - Professional employees on unpaid leave of absence may request an extension or renewal of such leave for good cause. The Board may, at its sole discretion, grant such requests, but failure to do so shall not be subject to the grievance procedure. All communications requesting, granting, or denying such extensions or renewals must be in writing.

7. Fringe Benefits - During the term of unpaid leave granted pursuant to this agreement, the Board shall continue to provide the employee with Blue Cross, Blue Shield, Major Medical, Dental Care, Vision Care and/or life insurance coverage so long as the affected professional employee pays the total monthly premium at the group rate.

8. Return from Leave - On returning to service from unpaid leave, the employee will return to the position vacated if it is still in existence and otherwise to a similar position.

I. Temporary Leaves of Absence

1. Types of Leave - Professional employees shall be entitled to the following temporary leaves of absence with full pay.

a. Sick Leave Days - Professional employees shall have available ten (10) sick leave days annually. Unused days may accrue without limit.

b. Personal Days - Professional employees will be allowed up to one (1) day leave of absence with full pay to be used for personal business.

c. Professional Days - Upon request, professional employees shall be granted excused absences by the Administration for visitation to other schools or for attendance at meetings or conferences of an educational nature when, in the judgment of the Administration, the expected benefits to the District outweigh the cost incurred.

d. Bereavement Leave - Professional employees shall be granted bereavement leave up to five (5) days because of the death of a spouse, child, parent, brother or sister and up to three (3) days because of the death of a parent-in-law, son or daughter-in-law, grandparent, grandchild, or near relative who resides in the same household.

Donald S. McPherson
ssor of Industrial & Labor Relations
ndiana University of Pennsylvania
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LITTLE MS. MUFFETT

Bartlesville Child Care Centers, Inc., is a private child care program for infants through pre-Kindergarten. Felice Navidad has taught as a long-term substitute for three years at the "Yogi Bear Children's Center" in firm's pre-Kindergarten program. It is designed to prepare four year olds for Kindergarten, particularly those whose backgrounds would make it hard for them to benefit fully from Kindergarten without some preparation. The Center follows the regular 180 day public school schedule and Navidad taught five hours a day. Teachers, both permanent and temporary, are represented by the Union of Educational Professionals.

Of the four long-term substitutes in the firm's five Centers around the city, Navidad had seniority. Last May, at the end of the school year, she was told by Mary Muffett, the Child Development Coordinator, that employer policy would recognize her as having priority for appointment as a probationary teacher should a vacancy arise. She was also told her eligibility for a permanent probationary appointment assumed continued satisfactory performance evaluations as a substitute teacher. They were satisfactory, and more. Muffett has been in her position for five years, has a Master's in Early Childhood Education, and is nearing completion of a D.Ed.

The collective bargaining agreement also provides: "In order of length of service to the employer, long-term substitute teachers holding temporary appointments shall be given first consideration for permanent, probationary vacancies provided they have the qualifications and ability to step in and perform the duties of the vacant position." The agreement also prohibits discrimination based on race, sex, color, religion, national origin, and handicap.

In June, Navidad told Ms. Muffett that she was pregnant and expecting a baby in late January. Muffett simply indicated that when the time came, Navidad could take maternity leave and not to be concerned. In September, one of the Terrific Toddler teachers at the Bugs Bunny Center notified the firm that she was moving from the area so a vacancy would arise for a position to begin January. The opening was advertised in mid-October and Navidad applied.

The Terrific Toddler program is operated at the two largest Centers, Bugs Bunny and Pluto, for children ranging in age from 12 months to four years. The Centers are open from 6:45 a.m. to 6 p.m., five days a week, twelve months a year. While designed to be a learning experience, Terrific Toddlers is really much more a straight day care program and does not stress preparedness like the Pre-Kindergarten program does. The vacancy at Bugs Bunny is for 4.5 hours a day, 218 days a year. Because the scale is higher, more work days are available, and the job is permanent, it would be attractive to a long-term substitute even though the pay is not that much greater.

Ms. Muffett reviewed the applications, and recommended to the Administrator that Navidad be continued as a long-term substitute and that the next most senior long-term substitute, Victoria Swamp, be named to the Bugs Bunny post. Muffett said Navidad certainly had the qualifications for the job and was the most senior long-term substitute, but that she did not have the ability "to step in and perform the duties" of this particular vacant position.

Muffett said she could not recommend Navidad based on the needs of the children serviced by the position. Because they are so young, many are away from home for the first time and many are not regular five days a week in attendance. Further, with this age group, there is little chance for true group activity since, at most, they engage in "parallel play." Especially at the younger end of the range (and we do have some children as young as 12 months at the Center for the entire time, five days a week), it is terribly important, in Muffett's judgment, to provide for continuity of the care-giver. Abrupt changes in the care-giver could, at this early formative stage, build an attitude of non-trust in the infant/Toddler according to the literature, Muffett reported.

Muffett argued that anytime the school has the luxury of planning, it should never permit a teacher to be in a position of taking a needed leave, to be replaced by a substitute, so near to the beginning of a new term. (Although Terrific Toddlers operates 12 months a year, it is totally closed between Christmas and New Year so January is viewed as a "new term" programmatically.) Muffett was also skeptical in her report to the Administrator because, she said, Navidad indicated in her application letter that she plans to return to work very quickly after the birth of her child to minimize any difficulties at the Center. Navidad indicated she would request a leave of no longer than three weeks.

Muffett pointed out that there's no way Navidad could guarantee that. She might not be able to leave her baby, or might have to return off-and-on because of early childhood illnesses, etc. Muffett says in her experience, 3-6 months is a reasonable projection for maternity leave. Muffett suggested that Navidad could continue as a long-term substitute with the Pre-Kindergarteners at Yogi Bear, where her absence would not be such a problem, and still be eligible for the next probationary vacancy once she does return to work full time.

The Administrator adopted Muffett's recommendation and officially informed Navidad. Thereafter she received notice that Navidad had filed a grievance protesting a violation of the collective bargaining agreement's long-term substitute preference provision and alleging sex discrimination.

Donald S. McPherson
sor of Industrial & Labor Relations
liana University of Pennsylvania
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MARGARITA - VILLE

Margarita Martinez had been employed as a probationary Mason-trainee, working on setting blocks in high-rise tower construction. She is 51 years old, 5'1" tall and weighs 270 lbs according to the records of her pre-employment physical. Prior to beginning her craft training in a new union-management training program focusing on minorities, she had worked on production jobs in factories. VILLE, Inc. is buiding a federally funded housing project and was under great pressure to employ female and minority craftspersons to meet affirmative action goals.

The Operations Vice President had serious reservations about Martinez's physique since she would be required to work on narrow scaffolding and would have to be able to maneuver to lift, pass, and/or set blocks and mix and lay mortar, all in concert with other employees around, above and below. However, Martinez passed her physical, had the necessary craft papers for her trainee classification, and there was no formal pre-employment agility test. So she was hired. The Operations VP said nothing to Martinez about his doubts, but did have a conversation with the construction foreman, who called to ask "who stole the brain and how long has it been missing?" when Martinez first reported to the site. The Operations VP assuaged the foreman's concerns, urging him to give her a fair chance and to closely observe for any agility problems. The foreman let off some steam concerning "government regulations" but said ok.

VILLE has a negotiated project agreement in force with the various craft unions working on the project. Article X, Section 3 provides:

> During the first 600 hours of work, an employee is considered to be probationary and may be laid off or discharged at the sole discretion and determination of management. Such layoff or discharge shall not be made the basis of any claim or grievance brought against the Company by any Union, provided, however, that this article shall not be used to discriminate on the basis of Union membership or to discriminate on the basis of race, color, religion, sex, national origin, age, or handicap.

Martinez had worked 184 hours when the Foreman notified the Operations VP that he wanted her terminated at the end of that week. During her work to date, she had received no disciplinary notices nor notices that her work was unsatisfactory. In fact, it wasn't "unsatisfactory," technically speaking, i.e., not poor enough to terminate her immediately. Based on his observations, though, her "physical structure" prevented her from being agile enough to perform the work satisfactorily in anything but the "most wide open spaces." To that point, she had been working under such conditions at basically ground/first story level on a straight wall.

But beginning the next week, her crew would be in higher and severely constricted areas. The Foreman said his judgment was that she wouldn't be able to handle those conditions and that, even if she were continued through her probationary period, he didn't believe she ultimately should be given permanent employment based on these limitations.

Furthermore, he indicated that her fellow workers had already used nick names such as "Tubby," and "Big Rita," in her presence -- in jest but "with an edge." On the day of his negative recommendation, though, things had gotten tense when the crew had to move out of the way for a block conveyer being raised through their scaffold and someone yelled "get that fat ass out of the way."

Rita reacted angrily and complained to the Foreman that she was tired of being harassed and said she wanted him to do something about it. His view was that the remarks would only get worse and would inevitably spill over into outright animosity. Therefore, he urged the Operations VP to "cut our losses and get rid of her now."

The Operations VP concurred and wrote her a letter of termination effective at the end of the week (200 hours) indicating that the Company "does not believe you possess the physical structure to enable you to do all the work required of a mason on our type of projects due to insufficient agility and mobility." After receiving her letter, Martinez demanded to see the Foreman and he met with her, the Operations Vice President, and the union steward.

The company officials explained that VILLE was making a decision based on her observed lack of physical agility and the unlikelihood that the Company would offer her permanent employment at the end of her probationary period. They also explained that she was not "discharged" and that her termination had no disciplinary or unsatisfactory work context. In fact, they were willing to give her a positive letter of recommendation. It was simply a business decision that made sense given all the factors, nothing personal.

The union steward asked whether it would make a difference if she lost weight. The Foreman responded that he couldn't say, but probably not since weight per se wasn't the issue and also that, after all, she wasn't getting any younger and weight becomes increasinly difficult to lose as one ages, especially if severe reduction is required. Martinez and her steward left unsatisfied and angry, saying that they would be filing a grievance.

VILLE has other five current employees working as Masons or Mason-trainees who weigh as much or more than Martinez. One is within the last 120 hours of his probationary period and will proably be offered permanent employment and the others are all permanent employees. All are white, non-Hispanic males and all are younger: 26, 29, 34, 41, 43. One is shorter than Martinez by one-half inch and weighs five pounds more; one is the same height and weighs the same; the others are taller and weigh more. The company claims that the agility-mobility problem simply hasn't appeared in their work.

Donald S. McPherson
or of Industrial & Labor Relations
iana University of Pennsylvania
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NOT A PEEP

GBZ, Inc. is the general contractor for two office towers in center city St. Louis. The first, Tower A, has been open for two months and steel erection has just gotten underway on the second tower, about 100 yards away. Eventually they will be connected with an atrium.

Among a number of women employees hired by GBZ for the project is Velma Jean Aikens, a carpenter apprentice. The construction site on which she worked covers three acres and contains two portable toilets for women "craftspersons." Of 153 construction employees at the site, 17 are women. There are a total of 21 portable toilets on the site, 19 of which are not designated for either sex but are used mostly by men and two of which are designated for women. Women have used the non-designated toilets in the past, but they are frequently victims of horseplay when they do. In addition, most of the undesignated toilets are filled inside with tear-outs from skin magazines and the walls are covered with sexually explicit graffiti, frequently involving the women employees.

Like many construction projects, the portable toilets are dirty; often have had no toilet paper or have paper that's dirty because it's been dropped or handled by dirty hands. They do not have seat protectors, running water, or sanitary napkin dispensers. In addition, over time, the two designated for women have been vandalized -- the bolts have been broken and one has a "peep" hole drilled in the side.

Tower A is off limits for construction workers, for obvious reasons. It's open and fully functioning as an office building. It has large, clean, fully equipped rest rooms on the first floor. GBZ has had a problem with construction employees sneaking in to use the tower restrooms even though that's prohibited. The company has rarely caught anyone using the Tower A restrooms; the two previous times it did they (both men) were warned for violating Rule 7 "Loafing or Wasting Time" and told that if they were again caught using unauthorized toilets they would be discharged.

Three weeks ago Aikens was caught using the women's restroom on the first floor of Tower A. She was given this same warning by the foreman with a union steward present. In response, she admitted knowing that the restrooms were off limits but protested the unacceptable conditions of the women's toilets at the site. She also said that the toilets were "so gross" that she had taken to holding her urine until she left work. She said she can document that the direct result was a urinary tract infection. Her urologist also warned her that using contaminated toilet paper can readily lead to similar infections. She has been diagnosed as suffering from cystitis and is being treated. She said flat-out that she had no intention of ruining her health and that if management didn't get the toilets cleaned up and keep them cleaned up, she would continue using Tower A.

The company did make an effort to clean the two women's toilets after the incident and plugged the peephole. But, as the site foreman told Aikens when he gave her the warning, it's hard enough to keep the men out of the women's toilets, much less to keep the women's toilets spic and span. The conditions don't bother the men -- or if any are bothered, they just carry their own toilet paper. In fact, the foreman remarked that "in the old days," (before "craftspersons") "there we frequently didn't even have portable toilets."

Aikens used one of the women's toilets once but while she was inside, someone threw a rock at it. Thereafter she returned to using Tower A and she did it openly and flauntingly. Her male co-workers -- who will be satisfied with the portable johns, but not if someone else gets to use the comforts of clean ones (and the 'break time' that goes along with walking over there and back, etc.) -- got increasingly upset and complained to supervisors about favored treatment.

The Foreman then started looking out for Aikens, and caught her as she was coming out of the women's room in Tower A about to return to the site. She admitted having been in the unauthorized rest rooms and having been gone from her station for about 18 minutes. She said she had menstrual cramps and had to urinate and would not under any circumstances use the women's toilets. The Foreman called in the union business agent and, in his presence, gave her a final warning.

Her response was, the next day, to LEAD a contingent of five craftspersons, female type, to Tower A to use the restrooms on their lunchbreak. The Foreman felt he had no choice but to fire her, which he did. Aikens has filed a grievance alleging discipline without just cause and discrimination.

Donald S. McPherson
sor of Industrial & Labor Relations
diana University of Pennsylvania
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NURSE DOE HAS A FAWN

Jane Doe was the Supervisor of the Central Supply Department of Southside Hospital. Central Supply is responsible for the distribution of all medical supplies and the sterilization of operating room instruments. During the fall, Jane became pregnant and informed the Hospital that she would be taking maternity leave sometime the next April.

Shortly thereafter a vacancy occurred within Central Supply and the position was filled by John Smith, an LPN. It was determined at the time that it was desirable to have an LPN in the department and that having someone with Smith's qualifications on board gave the assurance that there would be someone fully qualified clinically to take over the duties of Supervisor. Jane was not an LPN. In fact, she did not have any formal education beyond high school. She had "worked her way up" to her position during 15 years of service to the hospital in various positions.

The hospital provides all employees with a 120 calendar day medical leave for medical reasons policy, including maternity. Appropriately, Jane requested a leave in writing to begin April 29 and to end August 28. August 29 was stipulated as the date of her return to work.

Despite this official paperwork, there was some doubt in the mind of the Personnel Director that Jane would return to work since she told the Personnel Director prior to her leave that she had some major "home front problems" to work out: her husband adamantly opposed her returning to work after the birth of the child. While on leave, Jane made no contact with the hospital, nor was she required by any policy or procedure to do so.

August 29 came and went without Jane reporting for work or calling to let the hospital know of any complications restricting her from returning. The hospital deemed this job abandonment and, effective August 30, filled the position permanently by promoting John Smith. A copy of the letter mailed to Jane on the afternoon of August 29 and the hospital's Leave Policy are attached.

On August 30 at approximately 3 p.m., Jane called the Director of Nursing Services, her immediate supervisor when she was Central Supply Supervisor, to inform her that she would be returning to work at 7 a.m. on September 12. The Director of Nursing Services scheduled a meeting between Jane, the union steward, the Personnel Director, and herself to discuss what had transpired. At the conclusion of the meeting it was agreed that although Jane had violated policy and had not demonstrated the leadership and dependability required of a supervisor, her service to the hospital and unblemished past record warranted further consideration.

After deliberating for several days, the Personnel Director notified Jane that she would be offered a position as an aide in Central Supply. The offer was discussed with her in a face-to-face meeting and immediately and unconditionally rejected by Jane. The Personnel Director then composed a letter reiterating the offer and mailed it to Jane certified mail, stipulating that if a response were not received by September 9, she would be considered to have permanently severed her employment relationship. On September 9, Jane responded by accepting the position and she subsequently returned to work on September 12. The hospital assumed the matter was closed.

However, when Jane refused to sign the Payroll Change Authorization Form which would effect the reduction in her pay from Supervisor to Aide, she indicated that she was not signing because she was filing a grievance alleging that she was improperly demoted without just cause and discriminated against because of her sex. The collective bargaining agreement prohibits discrimination based on sex and also requires just cause for discharge, discipline, and reductions in rank or status.

SOUTHSIDE HOSPITAL
LEAVE OF ABSENCE POLICY

It shall be the policy of Southside Hospital to grant leaves of absence without pay to full time employees for the following reasons: personal; medical; military.

Specific policies apply for each type of leave:

A. Personal

The hospital provides an unpaid leave of absence for permanent full time employees who are unable to work due to certain restrictions. All such leaves must be requested in writing on the form provided by the hospital and must have approval of your Department Head, Personnel Director, and the President. If the leave extends beyond thirty (30) calendar days, the Hospital will make every effort to return the employee to his/her former job or one of a similar nature, provided a vacancy exists. The leave begins the first day (paid or unpaid) the employee is off work.

B. Medical

A leave of absence for pregnancy or elective surgery, or other medical absence of up to one hundred twenty (120) days may be granted provided that such leave is requested by the employee in writing. You will be paid for any sick days you have accrued, as well as vacation pay if you so desire. Once tis pay has been exhausted, the remainder of the leave will be unpaid. A leave of absence request form should be filled out in advance. If a medical leave extends beyond one hundred twenty (120) calendar days, the hospital will make every effort to return the employee to his/her former job or one of a similar nature, provided a similar one exists.

Donald S. McPherson
sor of Industrial & Labor Relations
liana University of Pennsylvania
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THE OLD FOLKS AT HOME

Background

Local 321 represents professionals in various classifications at the county owned and operated nursing home. The county is in dire financial condition and the union negotiated an agreement providing for no wage increases in order to preserve jobs. However, it did attempt to protect members in case conditions should change during the term of the four year contract, which is in its second year:

Section 5

For each year of this Agreement, employees covered by the Agreement shall receive the same wage or salary rate and fringe benefits which were applicable to them on the previous year. Provided, however, that should the county voluntarily grant a general wage increase across-the-board to any other County employees, an equivalent increase will be given to employees covered under this Agreement.

Local union members just learned from a newspaper article that the County Commissioners last night approved the recommendations of their Salary Board "to grant the traditional 2 percent increase given to court house employees who have served two years in rank." This was described as a longevity increase provided for by the County's personnel rules for non-organized civil service employees. Apparently these rules result in a 2% longevity increase for approximately 39% of the court house employees in any calendar year. It applies to all those not at the top of their respective pay scales. The pay scales for these jobs have 10 steps. So, until they're at the top of their scale each such employee gets the step raise each year and, at each two year period, they grant a 2% longevity raise.

The union knew nothing about this county pay system for other employees when it negotiated the agreement and the County assured the union that it had neither the plans nor the resources to pay across-the-board increases to any County employees in the foreseeable future.

Donald S. McPherson
Professor of Industrial & Labor Relations
Indiana University of Pennsylvania
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JC Gates, an employee
Bason aggressive proselytizing upon return from vacation/while on break/off-clock
Marvin Fine & other coworkers nicknamed him "Pearly" and acted the irritate & stig
Gates & Fine were disciplined for altercation
12 coworkers complained about sales to foremen. Gates agreed to limit activity
13 coworkers demanded full cessation & foremen concurred, Gates was fired.

PEARLY GATES

- Beliefs protected under Title VII, not behaviors.

J. C. Gates, "Pearly" as he was derisively called by his fellow employees, worked as a laborer in the maintenance department of OVERLAND LINES, INC., a long-distance truck hauler. Gates' principal duties involved the regular washing, interior cleaning, and occasional exterior painting of tractors and trailers.

While traveling on the road to Damascus, Ohio, last June on a camping vacation with his family, Gates was listening to a "born again" radio program and claims he had a conversion experience. Thereafter, he joined the Worldwide Church of God and has taken upon himself the task of converting others.

Upon his return from vacation in late June, Gates began using the time between arrival and clock-in to distribute Bible tracts to his co-workers. Sometime in late summer, he also began reading aloud from a Bible during the 30 minute lunch period. He also began leaving tracts on the windshields of employees' cars.

Sometime in September or early October, a co-worker, Marvin Fine, 'stuck' the nickname "Pearly" on Gates, an appellation he deeply resented. Every time someone used it in his presence, Gates started "preaching" about the coming judgment. Noticing that it was possible to irritate Gates and feeling resentful about his incessant proselytizing, Fine and several others began undertaking a series of practical jokes.

Someone put a bumper sticker on Gates' car containing obscene language. A few days later, some Hustler photos appeared on Gates' locker. The interchanges escalated to deliberate cursing in his presence as well as obscene gestures. Once, Gates responded by squirting Fine with his hose while washing a rig and Fine then threw a bucket of soapy, dirty water on Gates. Both were given written reprimands by the Foreman.

After the disciplinary incident, 12 employees complained about Gates' religious activities on the job to the Foreman, asking that he be ordered to cease and desist. The Foreman met with Gates and attempted to counsel him but Gates simply explained his calling. Gates did agree not to read aloud at lunch and not to place tracts in or on the cars of others. However, he continued to respond with admonishments every time a fellow employee cursed, told a 'dirty' story, or acted in any manner which Gates believed was "sinful."

These admonitions provoked increasingly common incidents of shouting matches, shoving, water squirting, etc. Finally, 15 employees confronted Gates and the Foreman at lunch one day and demanded that Gates be ordered to stop his religious activities on penalty of discharge. The Foreman did so and Gates responded by handing him and each of the others a tract and telling them he forgave them, whereupon he was discharged. He has filed a grievance alleging discipline without just cause and religious discrimination.

Donald S. McPherson
ssor of Industrial & Labor Relations
ndiana University of Pennsylvania
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A REAL KLINKER

In Tulsa, OK, GBZ, Inc. is building the 75 story tower which will house a revolving mausoleum on top for Oral Roberts when he's called home. Apparently he's gotten the word to start a new campaign -- for $50 million -- and he's worrying about whether he'll make it, so there's been a speedup on the project. GBZ is also building additions to the Theology School, the Stadium, and three other buildings at O.R.U. besides the "sky tomb," as it's dubbed. All of these projects are located in a newly developed area of the campus so the entire area is fenced in and the company has hired its own seven person security force.

It seems that nearly everyone at the security office uses profanity, some regularly. The Chief, Bill Benjamin, regularly uses "the f-word." A relatively new employee, Judith Klink, a clerk-typist for the security detail, has taken offense. She used to be a clerk-typist in the Admissions office at O.R.U. but was laid off when national giving levels went down recently. She has specifically complained about Benjamin's language to him and asked him not to use it in her presence. He says he's tried to be careful and the guards say he really has cut down on his use of the word, but it is apparently a regular feature of his vocabulary.

Two weeks ago, Klink asked the Assistant Project Manager, who handles most of the personnel matters, for a transfer to some other department. She gave no reason and, when he inquired, said she "would just feel better working in a different place." Klink is the only woman employee in the security detail. He told her there wasn't a vacancy at the time but he'd keep her in mind if one arose. She asked him to look diligently, saying she really was unhappy in security. Last week, Klink gave him a written request for transfer citing "coffee break problems, interpersonal difficulties with other employees, personality clash with supervisor and poor example set by supervisor."

The APM called her in and said he simply had to ask for details. She responded only that the lewd and vulgar language was really getting to her. He reminded her that it was a construction site and asked rhetorically if she really thought it were better anywhere else. She said, "surely it has to be -- if nowhere else in your own office" and said she had certainly seen nothing like this when she worked at the University. He reiterated that GBZ had nowhere else to place her at the moment but that she would be given every consideration if a vacancy occurred.

The next morning he received a brief letter from her stating: "In view of the Company's unresponsiveness to my complaints, I consider myself as having been forced to resign." That afternoon he received a written grievance charging "sexual harassment and constructive discharge without just cause." He had his assistant investigate the matter and the assistant reported the following:

1. Chief Benjamin sometimes changes his clothes in his office and on at least one occasion left the door ajar. Klink saw him in his underwear and acted embarrassed but said "nice legs, Ben."

2. Benjamin and his assistant with some frequency read Playboy, Penthouse, and similar girlie magazines on their lunch hour in his office. They make no secret of what they're doing and take no particular care to keep the door closed. At one time or another, probably all the security employees except Klink have joined in this activity.

Once, when she returned from her own lunch and observed the Chief and three others comparing centerfolds, one of the security guards said something like: "Miss Klink, if you'd care to join us, we'd be happy to subscribe to Playgirl or whatever turns you on." Klink told him she found the publications offensive and would appreciate not being confronted with them or being addressed in such terms. He apologized, said he was only joking and that it would not happen again.

3. Girlie magazines are also kept in the sergeant's desk drawer and anyone who wants to look through them on personal time is welcome to do so. The general rule is that the magazine is to stay in the drawer, which is opened so pages can be turned.

4. Pin-ups of nude and partially nude women are pasted inside the locker doors of some of the guards. Klink once walked by and saw one and complained to the Chief, who instructed all employees to keep their locker doors closed when not in use.

5. In particular, the sergeant's locker is visible to Klink from her work station and he has a full-length nude pin-up inside his locker door. Because he goes to his locker frequently to get coffee, snacks, and magazines, she often sees the pin-up when he opens the locker door.

6. One of the guards, whose father is a printer, brought mock business cards with vulgar cartoons on them and phone call message sheets with vulgar message choices to check off. These were passed around the office and left in view on desks but were not passed to Klink by anyone.

7. Deputies used memo pads, also provided by the printer, with vulgar illustrations or statements. One said "A day without sex is like a day without sunshine." Another said "Scratch Pad" and showed a hand scratching a buttock. On one occasion, the assistant chief left instructions on the scratch pad for Klink to type a report. She objected and he withdrew the written instructions, apologized, and gave them to her verbally.

8. Off-color jokes, usually with sexual content, are told regularly. Actually, most are probably brought in directly from construction employees. They were not told to Klink because employees knew she objected, but it was impossible to keep them out of her hearing. On at least two occasions, Klink said she did not appreciate having to listen to such trash.

9. A coffee can used as an ash tray was labeled a "butt can" and was wrapped with photographs of clothed male buttocks.

10. The employees regarded Klink as a hypersensitive, rigid person with very high moral standards. They say they did their best to accommodate to her views without allowing her presence and personal values to conflict with their own life styles. They said they didn't think the atmosphere was inordinately offensive for a construction site or security office and that no one had ever deliberately offended Klink once her objections became understood.

11. The collective bargaining agreement provides: "Neither the company nor the union will tolerate discrimination against any employee on the basis of race, sex, color, religion, or national origin."

Donald S. McPherson
Professor of Industrial & Labor Relations
Indiana University of Pennsylvania
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A RIGHT TO REFUSE TRAINING?

Background

Refuse and Salvage Drivers and Helpers Local 906 (Union) and the City of Popperville (City) are parties to a collective bargaining agreement. In the past several weeks, the administration of Mayor Michael Mulligan has been embarrassed by investigative reporters' stories in the media concerning the number of on-duty traffic accidents caused by City Sanitation, Public Works, and Transit Department employees. Mulligan himself had been a City Employee in the Public Works Department (steam shovel operator) and, with his crew, set a record during the administration of legendary Mayor Henry B. Swap for both speed and low rate of lost-time accidents in the construction of the old Town Hall, so the criticism was personally stinging.

For the first quarter of the year, employees in these three departments have been found liable for 31 work-related traffic accidents, causing not only public relations problems but considerable Legal Department time and expense as well as lost revenue because of settlement payments. On April 13, the Director of the Popperville Department of Sanitation, Micheline DeBris, announced the initiation of a new training program for all Drivers and Co-Drivers. The announcement was made in a letter to the employees, with copies sent to the Union and posted on all official bulletin boards. In pertinent part, the letter stated:

> Consistent with Mayor Mulligan's directive to provide increased driver safety training immediately to all City of Popperville employees whose job responsibilities require them to operate City vehicles, mandatory driver safety classes will begin effective April 20. The classes will be offered at the Central Garage. All Drivers and Co-Drivers in the Sanitation Department are required to attend these classes and to complete the entire Driver Improvement Program (DIP) within 24 weeks.
>
> DIP consists of 12 hours of classroom instruction supplemented by 15 hours of laboratory instruction. The first nine hours of laboratory instruction will be offered at the Central Garage using our newly purchased, $85,000 garbage truck simulator. This state-of-the-art equipment uses a computer program (Simulated Heterogeneous Intensive Training) to present as realistic situations requiring driver or bin-lever operator response a whole range of driving problems typically encountered on City streets in the course of a pick-up run. The other six laboratory hours will be completed in actual trucks in the parking lot, which will be set up as an obstacle course with pylons representing road hazards such as tricycles, blown-over garbage cans, storm-downed trees, mail boxes, sleeping drunks, parked cars, etc.
>
> The training is designed to be totally flexible. The classroom sessions will be offered in one hour individualized, videotape plus exam modules each of which will be repeated daily for two weeks before the next module begins. Sessions in the simulator and on the obstacle course will have to be scheduled as only one Driver and Co-Driver can be accommodated in the simulator cab or truck at a time. Employees may participate in the classes on the basis of their own scheduling convenience.

Employees will attend these mandatory safety classes after the completion of their daily routes. Employees are advised to begin a module only if it can be completed before the end of their eight hour work days, since overtime is not authorized for the training program.

Upon receiving the Union's copy of the letter, Union President Martin Dross called Director DeBris to confirm that employees would receive overtime pay for the time actually spent in training modules completed before the end of their work days. To his surprise, she responded that, as the letter stated, Mayor Mulligan has authorized no overtime none will be paid. Dross indicated that the Union would grieve and he and DeBris agreed that, in order to get the matter resolved as quickly as possible, he should file the grievance directly at the final step with the Department's Labor Relations Manager, Carl Dregs, for immediately consideration at the final step of the grievance procedure.

Additional Undisputed Facts

A. When a Driver or Co-Driver completes his daily route in less than eight hours and is assigned to perform additional work, the additional work is paid as hours in excess of the eight hour work day.

B. The average clock time spent by Drivers and Co-Drivers in the bargaining unit for the completion of their routes, including 30 minute non-paid lunch breaks, is 6.30 hours. All Sanitation Department Drivers and Co-Drivers are stationed at the Central Garage.

D. There is no past practice or negotiation history on point.

Pertinent Contract Provisions

Article V Job Classifications and Wage Rates

The following are the job classifications of employees in the bargaining unit covered by this Agreement and the basic hourly rate of compensation to be paid to the employees in their respective classifications. It is understood and agreed that wage rates shall not be changed during the term of this Agreement. . . .

Article VI Additional Hour and Wage Provisions

A. Each week each crew shall be assigned a weekly route made up of five (5) daily routes which require an incentive work pace to complete within eight (8) hours in each work day and within forty (40) hours in the scheduled work week. Each daily and weekly route may include both regular refuse and bulk items. Daily routes may be changed during the week if the weekly schedule is not being completed as scheduled. An employee shall be considered to have worked eight (8) hours when he completes his daily work route even though he may do it in less than eight (8) hours.

B. Inclement Weather and Equipment

1. If a weekly route is not cleaned up due to inclement weather or equipment failure or paid holidays, such crew shall work eight (8) hour work days until such route is back on schedule. Employees will not be held responsible for the failure to complete their work due to breakdown, shortages of working equipment, or lack of personnel.

2. In the event an employee is assigned to assist on another route after completion of his regular assigned work or is directed by the City to work more than eight (8) hours in a workday, such employee shall be paid time and one-half (1-1/2) his regular rate of pay for such work.

Article IX Grievances and Arbitration

* * * * *

C. The decision of the Arbitrator shall be final and binding, but in no way may modify or amend the terms of this Agreement.

Article X Management Rights

A. The Employer has the exclusive right and power to manage, control, and conduct its business, to plan and direct the working forces, including the right to hire, suspend, or discharge for just cause, promote, demote, schedule and transfer its employees and to make rules relating to operation as it deems advisable subject, however, to other provisions of this Agreement.

Article XIII Hours of Work

A. This Article defines the normal hours of work and shall not be construed as a guarantee of hours of work per day or a guarantee of days of work per week. This Article shall not be considered as any basis for the calculation of payment for overtime.

1. The normal workday shall be eight (8) consecutive hours of work exclusive of lunch periods in a twenty-four (24) hour period.

2. The normal workweek shall be Monday through Friday.

3. The normal workweek shall apply except for emergencies, including inclement weather, work stoppages, failure of utilities, or acts of God. In the event Saturday or Sunday work is required, the City will notify the employees and the Union no later than the preceding Wednesday.

4. In no event shall any employee work less than forty (40) hours in a workweek without permission from his or her supervisor.

Article XX Totality of Agreement

This Agreement spells out the total agreement in its entirety between the parties, including all wages, salaries, pensions and fringe benefits, and there shall be no additions or changes during the term of the Agreement.

Donald S. McPherson
rofessor of Industrial & Labor Relations
Indiana University of Pennsylvania
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SAME PLAYERS, DIFFERENT GAME

Background

In Tennessee, public school teachers are evaluated annually according to the statutory School Code regulations issued by the Tennessee Education Department (TED) using a standard rating form known as the TED-123. A perfect rating on the TED-123 is 80 points. Each School District can establish the cut-off point for a Satisfactory rating. In the Country Unified School District (CUD), a rating of 59 points or less is considered "Unsatisfactory."

It is a fact of life that in this District -- in most Districts -- Administrators have been poor evaluators. For the past five years, the mean rating for a teacher in this District has been 77.8. In fact, the two lowest ratings given to teachers in the five years prior to 1986-87 were one 59 and one 60. In both cases, the teachers in question were older, long-service individuals who did not contest the rating and who retired at the end of the year.

Beginning several years ago under an Education-minded Governor, Tennessee mounted a major campaign to improve teaching. The State appropriated considerable sums to improve teachers' salaries and to train administrators through workshops and seminars in a variety of skill-building areas, including performance appraisal. Districts have come under considerable pressure from TED at the state level and tax-paying citizens at the local level, who are paying the bill, to get serious about evaluating teacher performance.

Last year in CUD, all administrators attended intensive, retreat-type workshops in performance appraisal offered by the state using top-rated consulting firms and executives in private industry together with TED officials as the instructors. Last spring, the Superintendent wrote to all teachers, with a copy to the Union, notifying them that Administrators had each completed over 30 hours in performance appraisal training and that beginning this year, the District intended to "get serious" about the annual evaluations.

Teachers whose performance required improvement would receive ratings reflecting that status; those whose performance was below satisfactory levels would receive ratings reflecting their status; and teachers performing at excellent levels would receive ratings reflecting that status. The Superintendent also met with the Union and indicated that the Administration's intention was to cease making the artificially high, inflated ratings of the past and to rate all teachers accurately. The teachers' union president appeared at a School Board meeting and reported that, of course, the teachers supported accurate evaluations, but warned that the union would grieve if the new system were applied in an arbitrary, capricious or discriminatory manner.

Merveilleux ("Merv") Physique, teaches General Health, Sex Education, and Introductory French. He is a tenured teacher with five years experience in the District. His last four TED-123 evaluations prior to 1986-87 were 80 (1982-83); 72 (1983-84); 74 (1984-85); and 65 (1985-86). The primary criticism in each of the last three years has been that he is not as organized as he might be in presenting class material in lectures, particularly in Sex Education, that he uses poor quality, hard-to-read handouts, and that his writing on the chalkboard is difficult to read.

Evaluations for this year were released in December and Physique was given a 55 and told that he must demonstrate improvement in these areas. It is the District's policy, permitted by state law, to do a second evaluation three months after any Unsatisfactory Rating. In the second evaluation, just completed, Physique received a rating of 65 with a notation that he was showing improvement.

The Superintendent freely admits that Physique's work, itself, was not worse in this year than last year. What changed, he states, was the District's orientation toward and policies regarding the accuracy and validity of evaluations, of which all teachers and the Union were fully notified in advance. In short, the Administration admits that its Rating system changed, not Physique's work, i.e., that his work had become Unsatisfactory even earlier, but the former, inflated Rating system did not reflect it. From the Superintendent's viewpoint, Physique's case represents the success of the new system: he was given an accurate rating for the first time which required him to confront his weaknesses, which he did, showing measurable improvement.

Pertinent Contract Provisions

ARTICLE II General Terms of the Agreement

Section 2: Nothing contained herein shall be construed to deny or restrict either party in the exercise of such rights or duties as they may have under the School Code or any other laws or regulations.

Section 5: The Parties recognize that the Tennessee School Code includes many regulatory provisions associated with various classes of employees and various personnel actions. The parties hereby aver that all applicable provisions of the School Code in any matter are to be treated as included within the provisions of this Agreement and that said provisions shall govern and represent their complete agreement.

Section 12: Annual evaluations of professional employees, as required by state law, will not be made in an arbitrary, capricious, or discriminatory manner and must be supported by observation and other relevant records.

ARTICLE IV Rights of the Employer

Section 1: The District reserves to itself all rights to the management and administration of the affairs of the District except as expressly limited by this Agreement or by law.

APPLICABLE SECTIONS OF THE SCHOOL CODE

24 TENN 11 SC-123

Professional employees of all School Districts shall be rated a minimum of once each year utilizing the standard form provided by the Tennessee Education Department. Districts may establish their own standards for "Satisfactory" and "Unsatisfactory" ratings. Ratings shall be done annually by the District Superintendent. The Superintendent may delegate the responsibility for carrying out the evaluation to other administrative personnel, but must sign and be personally accountable for the annual evaluation of every professional employee.

26 TENN 13 SC-499

Two consecutive Unsatisfactory ratings of a professional employee shall be necessary to begin proceedings to dismiss on grounds of incompetency. The intent of this requirement is that dismissal, especially of tenured employees, not be based on the first instance of unsatisfactory performance but rather that it follows notice and an opportunity for the professional employee to improve.

Donald S. McPherson
Professor of Industrial & Labor Relations
Indiana University of Pennsylvania
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TRUE GRIT

William Tennent was employed by Quality Food Markets as a check-out register cashier at its store in Spring Hill, West Virginia. The store is a three year old, modern, comprehensive supermarket which, like the state's economy, is not doing particularly well. Tennent has worked at Quality for 18 months and is full time on a 9-5, Monday through Friday schedule.

Although the store is a seven day a week operation, Tennent told the manager at his pre-employment interview that he would not be available to work on Sundays since he believed in strictly observing the sabbath. The store manager agreed not to call him for Sunday work but cautioned Tennent that he might therefore miss overtime opportunities. Tennent said he understood and did not want to be called for Sunday work.

Last month, Quality decided to add New Grit, a new British-style sensationalist tabloid, to the racks at the check-out aisles. In addition to bizarre and violent stories, the paper always includes on page 3 a photo of a semi-nude woman. On the same page is a column called "Warlock's Corner: This Week's Evil Watch" which does an astrological forecast about "the activities of the Satanic spirits."

Tennent, an ordained elder in the Covenant Presbyterian Church and secretary of the Spring Hill's chapter of the Citizens For Decency, an anti-pornography group, first learned about the contents of New Grit on a Friday evening from the group's president, Hester Prim. Her sister-in-law bought one and was shocked to discover what was inside! When Prim called Tennent, she put the personal issue to him squarely with two questions: "how can you continue to sell that trash?" and "will you help us organize protests against it?"

Tennent spent the weekend reading scripture and prayerfully considering this dilemma. After agonizing all day Saturday and Sunday, he decided that he had to take some action and that, ultimately, he would not be able to sell New Grit at his counter. At work on Monday he informed customers who showed interest in the publication that the Citizens for Decency was asking people to boycott it.

That evening, a CFD executive committee meeting decided that Prim and Tennent should approach the store manager with an official request from the group that Quality cease to sell New Grit. If she refused to remove the publication from the racks, the group decided it would set up an informational picket line outside the store and begin a public awareness campaign in the local newspaper. Prim called the store manager, Joanna Witherspoon and set up an appointment for Thursday morning.

On Wednesday afternoon, a professor of sociology at the local university who was purchasing New Grit in Tennent's checkout line objected to his counseling and protested to Witherspoon. About 30 minutes later, Witherspoon called Tennent into the office and asked for an explanation. Tennent said he was acting consistently with his church office and his convictions concerning the publication, labeling them "values of conscience and religion."

Witherspoon, also an ordained Presbyterian elder (St. Andrew's Presbyterian Church in Green Hollow, about 30 miles away) said Tennent's opinions might be conscientious, but they were not in any way "religious." She pointed out her own church office and said freedom of speech was an equally desirable value of conscience and religion. It was the first either of them knew they shared both denominational affiliation and office. Witherspoon told Tennent she believed Tennent's values were personal and philosophical, not religious, and that he should cease any interference with customers.

On Thursday morning, Tennent accompanied Prim to an 8 a.m. meeting with Witherspoon. Prim asked Witherspoon to remove the tabloid and she refused. Prim also asked Witherspoon to stop "picking on" Tennent for his religious beliefs. Witherspoon responded that if Tennent's "so called religious beliefs" conflicted with his employment obligations, he could take his choice.

Witherspoon said she would not tolerate either an employee's interference with business based on that employee's personal moral values or "the crazies of the religious right who are out to destroy free speech." Prim told Witherspoon that the group intended to promote a consumer boycott of the tabloid if she did not reconsider. Witherspoon told her she would not and again warned Tennent not to interfere with customers.

Tennent began his shift and, other than averting his eyes, assiduously avoided any interference with customers purchasing New Grit. He did wear a small white ribbon tie tack, symbol of the CFD. Quality provided white shirts and striped ties for male cashiers, but had no regulations concerning jewelry such as pins and tie tacks.

During his 30 minute lunch break, Tennent clocked-out, which employees were permitted to do, put on a raincoat so as to cover over his store uniform, and joined a small informational picket line which Prim and the executive committee formed on the sidewalk outside the store entrance. He carried a placard reading "WEAR A WHITE RIBBON FOR DECENCY AND DON'T BUY NEW GRIT."

Furious, Witherspoon told the pickets she was calling the police if they blocked the store's entrance and told Tennent never to participate in such demonstrates again "as long as he wanted to work for Quality" because the store considered his actions to be deliberate efforts to undermine the business, self-help, and disloyal. Tennent said that what he did in the practice of his religious beliefs on his personal time was of no concern to Witherspoon but, out of regard for the manager's sensitivity, he would demonstrate only in the evenings after his shift and on the weekends, not during breaks. Witherspoon told him that wasn't good enough and he should consider the matter carefully.

The next morning, Witherspoon asked whether they might talk the issue over, elder-to-elder, in the presence of Witherspoon's minister -- or both of their ministers. Tennent replied that he was considering the issues prayerfully and that he didn't need the guidance of any minister to read and interpret the meaning of scripture for his life. He assured Witherspoon that he bore no ill will and that he was sorry the confrontation had to occur, but asked the manager prayerfully to reconsider her own views.

On Saturday evening, a letter to the editor in the local paper informed readers of CFD's perspectives on "publications which do violence to community standards by promoting pornography and Satanism" and asked community residents not to buy New Grit from Quality or any other stores which might decide to sell the publication. Tennent was one of the 10 signers of the letter, among whom were also the local Baptist and Methodist ministers.

On Monday morning when Tennent reported to the store to clock-in, Witherspoon called him and the store's union steward into the office. Witherspoon said she considered the letter to the editor another act of deliberate disloyalty.

Tennent said he was only exercising his own right of free speech. Witherspoon said she disagreed and was giving Tennent an official oral warning. Further defiance would fundamentally undermine their employment relationship, Witherspoon said, and lead to Tennent's suspension and/or discharge.

At about 10:00, Prim came through Tennent's check-out and he told her about the warning. UnKnown to Tennent, Prim returned to the picket line, painted a new placard protesting the discipline and calling for a consumer boycott of the store. When Witherspoon saw the new placard about two hours later, she immediately called Tennent to the office and ordered him to get the group to cease calling for a general boycott on penalty of discharge. Tennent explained that he had nothing to do with that decision but did convince Prim to cease carrying the new sign, and returned to work.

In the meantime, word had already been spread by college students who patronized the store and later that afternoon a rival picket line was set up by the "Americans for Free Speech." Police arrived to keep order and photographers and TV news cameras descended on the scene. The store's sales, which had not previously been affected by the controversy, were off 32% that day compared with an average Monday.

A local newspaper reporter called the national office of the Presbyterian Church U.S.A. concerning the denomination's stand on pornography vs. freedom of speech. In the evening edition, a spokesperson from the national office was reported to have said that the denomination obviously did not condone pornography but also valued free speech, and that individuals had to arrive at their own best judgments in gray areas after "prayerful reflection." The quotes were printed in a story Monday evening.

On Tuesday morning, Tennent reported for work 30 minutes early and asked to speak to Witherspoon. Tennent said he could no longer work the check-out cashier job if it required selling New Grit because it violated his religious principles. Witherspoon replied, "I accept your resignation..." but before he could finish Tennent said he was not resigning but requesting a transfer to another position which would not require sales of the publication. Witherspoon told him to "take a break" and come back in to the office with his union steward in 30 minutes.

Tennent appeared with his steward as directed. Witherspoon said the store had only three vacancies and on only two could he bid successfully based on his seniority. The Union steward agreed that Tennent could bid successfully on the two vacancies and asked for information about the third. Witherspoon responded that it was as sales clerk in the about to open special up-scale make-up and beauty products department which the supermarket had just started promoting as a distinctive feature of the store. She said 98% of the products for sale in the department were for women (a very small line of make-up and skin cleansers for men was included) and that the vast majority of customers of the department were women. She said it only made sense to have a woman in a job selling women's make-up and beauty products to women. The salesperson had to be able to counsel women on what cosmetics to buy, how to apply them, etc. She said she would not consider Tennent.

Of the other two positions, the first, which paid $1.25 less per hour and could not be guaranteed as full time, involved manning the service desk and selling state lottery tickets. Tennent said he could not accept because he objected to gambling on religious grounds and needed a full time job. Exasperated, Witherspoon said she was willing to offer Tennent the other vacancy. It paid $.21 more per hour as produce manager. However, Witherspoon pointed out that the job would require his working at least occasional Sundays because Quality frequently received shipments of fresh produce on Sundays and the items had to be unpacked and prepared for display on Monday morning. Tennent reiterated that he would not work on the Sabbath.

The steward then proposed that he be permitted to work steadily on the "express/cash only" counter and that the magazines be removed from that counter only. Witherspoon refused, saying she had no intention of letting individual employees determine what, where, or how she was going to operate the business and that items along the aisle sold just as well in express as in any other aisle.

She then directed Tennent to return to his job and Tennent said he could not. "Then I guess we will have to consider this a voluntary quit," Witherspoon declared. "No," Tennent said, "I consider it a discharge without cause and a violation of my rights to free speech and not to be discriminated against." Tennent then left, telling Witherspoon that he was going to consult CFD's attorney and telling the steward he would be in touch after the shift about filing an immediate grievance.

The collective bargaining agreement provides that the employer has the right to discipline and discharge employees for just cause and also prohibits discrimination on the basis of race, color, sex, religion, national origin, age, and handicap.

Donald S. McPherson ©1990
Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

A CASE OF INSUBORDINATION?

Two weeks ago during an incidental conversation around the coffee machine during a break, Mark Mania, a Millwright Helper, asked Melt Shop Supervisor Les Messingame whether his shift would have a safety training meeting in the near future. Messingame replied that he thought so, and that he'd let Mania know. Messingame has been Foreman of the Melt Shop at Vulcan Forge for about six months. He has been in the forging industry for over 30 years, however, with all of his previous experience being in New Castle, England, with the U.K. company that acquired Vulcan as a wholly-owned U.S. subsidiary about eight months ago. Messingame is thought of my the Melt Shop employees as a tough, no-nonsense, but generally likable boss who doesn't hesitate to show and use his authority when he thinks it necessary.

On Wednesday afternoon this week, before the end of his crew's shift, Messingame posted notice of a mandatory safety training meeting at the beginning of the shift on Thursday on the official bulletin board next to the time clock. The accepted practice of the parties is that safety training meetings, usually about 20-25 minutes in duration and usually called with one day's notice, begin 30 minutes before the scheduled start of the shift. Employees are paid at overtime rates for attending the meetings, which are mandatory.

Mania failed to attend the posted training meeting, which lasted 20 minutes. When he arrived at the clock area 10 minutes before the start of his shift on Thursday, the other workers were just coming out of the meeting, followed by Foreman Messingame. Messingame asked Mania why he had not attended. Mania retorted somewhat angrily that Messingame hadn't told him there would be a meeting, as he promised he would. Messingame denied that he had agreed to inform Mania personally and said he had put the customary notice up on Wednesday -- the day before, as usual -- for everyone to read. Mania said he had missed the notice when he clocked out Wednesday and repeated his claim that he had specifically asked the Foreman about upcoming safety meetings and received a commitment that he would be notified. Messingame pointed out that all other department employees on the shift, except for those on sick leave or vacation, saw the notice and were at the meeting. "Get clocked in and on the job," Messingame said, "we'll see about this later."

The Foreman consulted with the Human Resources Director and together they discussed the incident and reviewed Mania's record. Mania, who has worked for Vulcan Forge for ten years, has the general reputation of having a hot temper and his record is otherwise "clean" except for six instances of warnings (five oral, one written) for various sorts of emotional outbursts toward co-workers or supervisors over the past five years. Most recently, Mania was involved in an incident seven months ago in which he yelled abusively at and criticized co-workers for the way they were doing a job. Following a discussion with Union officers, who then counseled with Mania, a disciplinary interview was held in which he was told that if he acted in a similar way again, he could be suspended.

At the end of his Thursday shift, Mania was called to the Foreman's small 6' x 8' office cubicle together with his Union Steward. Messingame was seated at a small desk, the Steward was just inside the door and Mania stood in the doorway. Messingame told Mania he was giving him a verbal warning, recorded on an "Employee Warning Notice," for violating Shop Rule 20, "Failure to Report for Scheduled Overtime Work Without Good Reason." Messingame explained that he had talked the situation over with the Human Resources Director and, after examining Mania's file, it had been decided that he should be warned as an official disciplinary measure.

Mania was incensed. He refused to accept the warning slip and began cursing and flailing his arms about in the doorway. "Who's out to get me? Someone's setting me up!" he yelled at Messingame, crumpling a Pepsi can in his hands and flinging it hard 2-3' into a metal waste basket between the Foreman's swivel chair and where he stood in the doorway. "You promised me you'd tell me if there was a meeting -- I went out of my way to ask. You can shove your disciplinary slip . . . in my file," Mania told Messingame, "I'm not taking it."

Now becoming angry himself, Messingame told Mania in a loud, firm, but clearly emotional voice that the slip was an official disciplinary record. Messingame then ordered Mania to take the slip on penalty of insubordination. The atmosphere was tense and no one moved, or, it seemed, even breathed. A few moments passed before the Union Steward quietly and calmly advised Mania to take the slip and file a grievance. Messingame and Mania stared, red-faced, purse-lipped and steaming at each other for several moments and then Mania lunged across the open space between them and quickly brought his right hand up and around from behind him, snapping the slip from Messingame's fingers. Messingame recoiled and fell back in his swivel chair, pushing it against the wall. Staring at the Foreman, Mania grinned, rolled the slip into a ball, put it in his mouth, swallowed it, and left the office.

Messingame went immediately to the Human Resources office to report the incident. On the basis of his record and his behavior, Mania was given a two week suspension for "gross insubordinate behavior." He is filing a grievance.

PERTINENT PROVISIONS

ARTICLE XV "MANAGEMENT"

> The Management of the plant and the direction of the working forces including the right to hire, promote, transfer, suspend or discharge for proper cause, under the theory of progressive discipline, and the right to relieve employees from duty because of lack of work or for other legitimate reasons is vested exclusively in the Company.

SHOP RULE 20 (promulgated unilaterally by the Employer)

> Mandatory Safety meetings and other posted, mandatory meetings, must be attended by employees unless they are on sick or vacation leave. Such meetings will be treated as scheduled overtime and paid at the premium rate.

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Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

A WAKE AND ASLEEP

Joe Biegler is a Journeyman Mechanic stationed at Erie, PA, in the Maintenance Division of Appalachian Airways, a commuter airline servicing small and medium-sized airports in the northeastern U.S. Although AA considers his work as a mechanic to be very good, he has had a long history of attendance problems leading to oral and written warnings as well as to four suspensions: one day, two days, one week, and two weeks. His record improved somewhat after each disciplinary action but then slipped back into the old pattern. After warning him that his job was in jeopardy if his attendance did not improve, AA discharged Biegler about six months ago for habitual absenteeism.

At the second step of the grievance procedure, Biegler said he had an alcohol problem and sought treatment and reinstatement through the provisions of the joint Union-Management Employee Assistance Plan. The EAP provides that employees seeking assistance in lieu of discipline are referred for medical examination and evaluation for alcohol or drug dependency. If such dependency is confirmed, the employee is entered into a prescribed residential detoxification and rehabilitation program. The employee must sign a "last chance" agreement providing, among other conditions, that he or she will be closely monitored and must follow the after-care instructions of the Company Physician upon completion of the rehabilitation program.

At the third step grievance meeting, conditions of Biegler's re-employment were established in a "last chance" agreement drawn as an addendum to the Disciplinary Action Report which led to his discharge. As settlement of his grievance, Biegler agreed to sign the following document:

DISCIPLINARY ACTION REPORT ADDENDUM
Last Chance Agreement

Wishing to be reinstated to my employment and acting of my own free will, I promise:

a.) To remain alcohol and/or drug free, to inform the Company Medical Department of any medication I take, and to follow the prescribed.

b.) To provide all medical information required by the Company and to sign any necessary waivers to obtain such information.

c.) To submit to blood/urine tests upon demand of Management.

I recognize that should I report to work or be at work or on Company property under the influence of alcohol or drugs, I can be immediately discharged and that such discharge will be for just and sufficient cause.

I further agree that failure to adhere completely to these conditions will result in my immediate discharge. I fully understand and agree with these conditions as full settlement of my grievance.

s/ JOSEPH BIEGLER

Biegler signed this last chance agreement, which was also initialed by the Manager of Maintenance and by the Biegler's union steward, approximately six months ago. He subsequently completed a 30 day residential treatment program and was returned to work upon signing a Reinstatement Agreement fully reiterating the conditions of re-employment outlined in the Last Chance Agreement. This second signing of a document outlining the conditions of reinstatement is used as a reinforcement tool and is customary for all EAP participants.

Biegler's attendance since his return to work has been satisfactory and he was a regular participant in Alcoholics Anonymous. Early last month, while off duty, the Grievant was arrested near San Diego for driving a rental car under the influence of alcohol. Biegler's stepfather, with whom he had been very close, died after a long illness and Biegler had taken a bereavement leave to fly to the West Coast and be with the family. Biegler's stepfather was Irish and the mourning included an old-fashioned Irish wake. Nearly overcome with grief, Biegler succumbed to the persistence of family and friends who, not knowing of his condition, prevailed upon him to have a drink. One became three or four. He fell asleep at the wheel just after pulling into the parking lot of his motel at about 4 a.m. and sideswiped a parked local police car. Two local police officers were just coming out of the motel's bar after responding to fight call and saw him hit their parked car. Biegler consented to a breathalizer test, which showed a blood alcohol level slightly above the legal limit.

Upon returning from leave, Biegler immediately reported his arrest to his supervisor, who said he would relay the information. His supervisor told him to continue working but to keep management advised of the legal proceedings in the case. A California attorney plea-bargained an assignment to accelerated rehabilitation for Biegler on condition that he attend driver's re-education classes sufficient to satisfy Pennsylvania standards and that the class instructor certify to the California court his completion of the program. He was relieved and immediately informed his supervisor of this outcome.

Two days later Biegler was called with his union steward to a disciplinary interview conducted by the Manager of Maintenance. At the conclusion of the meeting, the Maintenance Manager said Biegler would be discharged effective at the end of the shift for failure to adhere to the conditions of his last chance agreement. The steward heatedly accused the Maintenance Manager of lacking common sense and basic human decency and said the Union would be grieving the discharge. In an equally heated response, the Maintenance Manager reminded the steward that the EAP was a joint labor-management program which the Union was undermining if it pursued discharges that simply enforced the express conditions of last chance agreements. The steward charged out of the room, saying, "If that's going to be your position in the grievance procedure on this one, you might as well get ready to tell it to an Arbitrator."

PERTINENT CONTRACT PROVISIONS

Section 105 "DISCIPLINE"

The Company has the right to discipline employees covered by this Agreement for just and sufficient cause under the theory of progressive discipline. Discipline, as used here, includes the making of any written record entries as well as suspension or discharge.

IN THE PUBLIC INTEREST

Marjorie Morningstar teaches senior English and Drama in the English and Theater Department of the Harris Township Joint School District Senior High School. In February, Morningstar had served as adviser to the youth group of the Covenant Presbyterian Church, which she attends. The group put on a play in the church social hall that carried a strong anti-drug message. It was widely publicized to both parents and their teenage children in the community. There was no admission charge and three performances were given, one Friday night, one Saturday night, and one Sunday afternoon, to a full house of approximately 350 people each time. Harris Township is a very rural area in southwestern Ohio. The high school and church are both located in Modernia, the only town of any size in the area, which has a population of approximately 2,300. A weekly paper serves the town and surrounding township.

Morningstar, who has served as director for the Senior Class Play at Harris Township High for the past 10 years, was writer and director of the church play. She wanted to have the dialogue be as authentic as possible, and some of the conversations among characters playing drug user and seller parts was very straightforward and frank. There was no doubt it would be considered offensive and probably obscene by community standards. Because of the potential for negative reaction, Morningstar had shared a script of the play with the minister and Board of Elders in advance. The Board meeting was quite heated on the subject of the characters' language. Even though all agreed that it was realistic, some felt it too vulgar for a church group to use, particularly in the church itself. After a long debate, the Board voted 11-7 to allow the play to be performed as written.

The Modernia Borough Weekly Messenger, published on Monday, carried a review of the play as well as an editorial. The reviewer praised the actors' performances and the initiative shown by the church and the youth group to publicize the anti-drug message. But the review objected strongly to the vulgarity of some of the dialogue, calling it language "far too nasty to be quoted in this newspaper." An editorial in the same issue also praised the youth group for its intentions but severely criticized the church for allowing such language to be used when it was trying to put out a message concerning morality. The editorial implicitly criticized Morningstar, never mentioning her by name, by suggesting that the language written and approved by the director would never be approved for a public school play. It questioned how the language could ever have been approved for use in a church.

The next weekly issue of the Messenger carried a half dozen very angry letters to the editor criticizing the church and, especially, Morningstar. A week later there were four more critical letters and two favorable ones and thereafter the subject died in the local press. But it remained the talk of the town throughout the late winter and early spring. In fact, it was the most widely talked about and controversial issue in the District since the narrow rejection of a school construction bond issue by voters the previous fall. The story was also picked up by the daily press in Cincinnati and Dayton and was the subject of a number of night time radio talkshows in those metropolitan markets. The theme of the treatment given by the urban press to the story was one of censorship and small town values in rural Ohio.

When the incumbent chairperson of the English and Theater Department announced her retirement in late April, the School District posted the vacancy and Morningstar, the senior teacher in the department, applied. She was positively recommended for the position by a 7-1 vote of the English Department.

Morningstar was interviewed by the High School Principal and the District Superintendent, Dr. Ulrich Mauser. Mauser told her he was extremely concerned about the negative publicity which the church play incident had generated. A new vote on the construction bond issue was scheduled for the spring primaries in the last week of May. In the School Board's view, it was imperative that the construction bond issue be approved because the cost and, especially, scheduling inconvenience that would be required to try to renovate existing inadequate buildings would be enormous. The Superintendent and Board were convinced that the bond issue had to pass at all costs and had made every effort since its rejection in November to appease the electorate by demonstrating savings in operating costs and by educating the public about the poor condition of several existing school buildings.

Mauser asked Morningstar about the language used in the church play. She explained that it was dictated by the nature of the role and the need for authenticity. Mauser assured her that he believed the play performed a highly useful social service and commended her for her involvement, accepting her explanation for the language as fully satisfactory. However, reminding her about the fragility of the upcoming bond referendum and speculating that news of her appointment as Department Chairperson would bring a new outpouring of criticism, this time directed at the District, Mauser asked Morningstar to give a similar explanation to the public. When asked what he had in mind, Mauser suggested a press conference with the Messenger and local radio stations and a letter to the editor. He also wanted her to appear on talk shows in the nearby metropolitan markets and to give statements to the press in those areas if it became necessary.

Morningstar asked if politicking were a requirement or expectation of the job of Department chairperson because, if so, she did not want to hold the job. Mauser replied that politicking was not a job requirement or expectation but that her cooperation would make her appointment much easier at this particular time because of the peculiar timing of the bond referendum. "Your cooperation," he said, "would not only be in your interest but in the public interest."

Morningstar responded: "I'm a good teacher and a good drama coach. I perform all my professional responsibilities to the best of my ability and my performance reviews have always been outstanding. I have the support of the Department faculty and have every reason to believe I can do an excellent job as Chairperson. I don't want to get involved in all kinds of public relations activities that distract me from my work, interfere with my privacy and that of my family, and demean me personally by subjecting me to twisted questions from reporters looking for a juicy story."

Mauser asked her to reconsider; Morningstar refused. Mauser said he therefore had no choice and could not approve her candidacy. The Superintendent then wrote her the letter below and, upon its receipt, Morningstar filed a grievance through the Teachers Association.

Dear Mrs. Morningstar:

I regret that, acting on the authority of the School Board, I must reject your application for the position of Chairperson of the English and Theater Department.

We recognize that you are the senior teacher in the department, are capable of performing the job duties, and have been recommended by a majority of the faculty. However, the Board believes your appointment at this time does not meet the needs of the school system and will not be in the best interests of the students of the District.

We regret not being able to accept your application. Be assured that this decision is not intended to reflect negatively on your outstanding performance as a teacher of long service in the District.

Sincerely,

Ulrich Mauser, Ed.D.

PERTINENT CONTRACT PROVISIONS

Article XIV "PROMOTION TO DEPARTMENT CHAIRPERSON"

When the position of Department Chairperson becomes vacant, faculty members in the department will be invited to submit recommendations to the Superintendent of Schools. The Superintendent shall make the final decision, with due regard to seniority, the needs of the school system, and the interests of the students, provided, however, he does not exercise his discretion in an arbitrary or discriminatory manner.

If the Superintendent appoints a person other than the one recommended by the faculty of the department concerned, he shall explain his reason for doing so in writing. Any dispute as to whether the Superintendent acted arbitrarily or in a discriminatory manner may be the subject of a grievance, which shall be processed in accordance with the grievance and arbitration provisions of this agreement.

-- adapted from a case by the
American Arbitration Association

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Department of Industrial & Labor Relations
Indiana University of Pennsylvania

OLD YANKEE DOLLARS

Old Yankee Trader is a large, nationwide New England direct mail enterprise specializing in outdoor clothing and equipment that has grown enormously since its founding as a dry goods store by Lawrence L. Beam in Bar Harbor, Maine in 1921. Over the years the store opened up other New England branches and, in the late 1950s, began to add a mail order catalog service. While it still operates its "flagship" store in Bar Harbor, it closed down its other retail outlets in the early 1970s and transformed itself, by 1980, into one of the nation's premiere direct mail firms. The firm operates from a large, modern national office headquarters, warehousing, bulk mailing, and telemarketing facility in Bangor in an industrial park bordering the international airport. Hourly employees are organized in a single bargaining unit represented by the Amalgamated Clothing and Textile Workers' Union.

Two years ago Old Yankee was taken over as a wholly-owned subsidiary of The Hudson Bay Co., a Canadian-based retailer. Based on speculation that mailing costs were going to continue to rise dramatically in the U.S. and on the assumption that nation-wide catalog exposure in the 80s had won a large, loyal audience, the Bay's management recently made a controversial decision on a new business plan for Old Yankee. The plan calls for a 30% cutback direct mail marketing and the opening of retail outlets in about 25 trendy, upscale sites across the U.S. As a result, Old Yankee recently announced to its employees and the ACTWU the intention to layoff 110 employees, primarily in the warehousing, bulk mailing and telemarketing departments.

As it grew from an original family-owned operation, Old Yankee developed a culture highly valuing loyalty to and from its employees. Every attempt has been made, for example, to promote from within whenever possible. One result of this organizational value is that many employees initially hired as secretaries have been promoted or transferred, over the years, into better-paying bargaining unit positions such as administrative assistants in headquarters offices, account managers in telemarketing, and inventory and quality control positions in the warehouse.

When it first occupied its newly constructed Bangor facility in 1972, Old Yankee purchased and installed a communications system which included stand-alone, dedicated Lanier word processors in offices that were not linked to the company's computer systems used for marketing and inventory control. All secretaries were sent for three weeks of training offered by Lanier in order to use the equipment and a one week 'advanced applications' course about three months after their initial training. As the direct mail, telemarketing operation grew throughout the 70s and early 80s, this failure to link communications through a common system came to be seen as a major internal obstacle.

One of the first things Hudson Bay management changed after the acquisition was the internal communications system, investing substantial dollars in an integrated, IBM-based system also compatible with the Bay's system. The change resulted in secretaries having to switch over to IBM and IBM-compatible PCs at their workstations. The Lanier equipment was junked and secretaries received one week of intensive training in WordPerfect, the standard communications software chosen by management for its internal communications. Many executives and some other employees already knew or also received training in IBM-compatible software, of course, and in fact a number began to keyboard their own correspondence and reports directly without need of a secretary.

According to the post-layoff table of organization announced by the Company to the Union, 23 former secretaries who had been promoted or transferred to other positions were slated for furlough but were senior to 12 of the incumbent secretaries in headquarters who were being retained in secretarial positions. In her reaction to the Company's plan, the Union president observed, among other things, that management apparently had not taken into account the bumping back into secretarial jobs that was likely to occur.

In response to that point, the Employee Relations Manager indicated that management had considered all such bumps and that all former secretaries occupying other positions from which they were about to be furloughed were not qualified to return to secretarial jobs. "They're all from the Lanier era," she explained.

"We've now changed our entire communications system," the ER Manager continued, "and we are totally dependent upon IBM-compatible hardware and software. We are making a major change in our business plan and this transition cannot be interrupted by employees who have to get back on the learning curve at the bottom. Our position is that none of the former secretaries, all of whom occupied their secretarial positions before installation of the new IBM-based system, are able to do the work of secretary as it now exists."

"If that's your position," the Union president replied, "you can certainly expect a grievance on that issue in no more time than it takes to write it up. And if you won't change your position, get ready to spend some of your Yankee dollars at arbitration."

"If they have the qualifications to bid on other job titles being retained after the layoff, they may certainly bump into those jobs if they have greater seniority," the ER manager replied. "But our view is that only secretaries trained in the new IBM-based system are eligible for secretarial jobs. If you don't agree, you certainly have the right to file your grievance, even though we don't think it's meritorious or very conducive to promoting a minimum of disruption in what is, for everyone, a very difficult transition. We'd hope that the Union would cooperate with us in applying the clear terms of the agreement rather than creating unnecessary obstacles just to try to slow down what, unfortunately, has to be done."

PERTINENT CONTRACT PROVISIONS

ARTICLE I---MANAGEMENT

The management of the company, the direction of the work force and the right to hire, transfer, promote, furlough, discipline for cause, and discharge for lack of work are vested exclusively in the Employer except as expressly modified by the terms of this Agreement.

ARTICLE XVII---SENIORITY

Section (a) Definition of Seniority

Seniority shall be implemented under the terms of this Agreement on the following basis: total length of service in the Company, provided the employee has the ability to step into and perform the work of the job at the time a job is awarded.

Section (b) Promotion and Transfer

Promotion or transfer to bargaining unit vacancies shall be made on the basis of company seniority, provided that the senior employee possesses the qualifications for the position or can demonstrate the qualifications within a reasonable period, not to exceed 30 days. Management shall not be required to retain an employee in a position to which the employee has been transferred or promoted if it has substantial evidence that the employee will not be able to demonstrate the qualifications within a reasonable period.

Section (c) Reduction and Realignment

(1) Reduction in Work Force

In all cases where the work force is to be reduced, bargaining unit employees with the greatest seniority shall be retained provided that they have the ability to perform the remaining available work. When the number of Employees is to be reduced, the following procedure shall apply:

(a) The senior Employees (company seniority) in each job title shall be retained in their respective job titles, up to the number needed.

(b) Those Employees displaced from their job titles shall be eligible to bump into other jobs on the basis of company seniority. In order of seniority, each such displaced employees shall be assigned to the available job title having the greatest standard daily wage rate within which there is an available job, provided that the assignment to specific positions within a job title is at the exclusive discretion of the Employer.

(c) Any Employee who is not retained in his or her job title and who does not have the ability to step into and perform the available job under the procedure in (b) above shall have the right, to the extent his or her seniority permits, to displace any less senior Employee holding a job which such more senior Employee elects.

(2) Procedure

In all cases where the working force is to be reduced or realigned, management shall meet with the union committee in advance to review the available jobs and the individuals to be laid off, retained or realigned.

Donald S. McPherson © 1990
Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

THE IPCRESS FILE

Charlie and Mike Ipcress, cousins, are both employed as Custodial Worker/Laborer I in the Buildings and Grounds Division of State University. With a 39,000 student campus, State is by far the largest employer in Central County. The University has nearly 200 buildings on its main campus in College Station borough and numerous others on a sprawling north campus complex located about 7 miles away across town. State also rents some facilities in the borough. The Buildings and Grounds offices, maintenance and craft shops, and the motor pool/garage are at north campus, while the warehouse, shipping and receiving are all on main campus.

On July 17, Charlie and Mike were directed by work order from their supervisor, Duke Foreman, to pick up eight new legal size, six drawer filing cabinets from the Athletics complex on north campus, where they had been mistakenly delivered by the vendor, and to deliver them to four sites: the Agriculture building on north campus (3 cabinets), a rented office in College Station (1 cabinet) and two academic department offices (4 cabinets) in the College of Business on the main campus. They were told to use one of the utility mini-pickup trucks, which are equipped for radio communications with the supervisor's office.

The Ipcresses drove to field house, located the filing cabinets on a loading dock, and loaded the first four cabinets into the truck bed, upright, lengthwise, and two abreast. They fit almost exactly because the available space was limited by the wheel wells on the sides and a small tool storage chest sitting across the truck bed nearest the cab. The truck has low sidewalls and is not equipped with tie-down racks, ropes, or hooks but ~~was routinely used by employees in the past,~~ → 2st practice including the Ipcresses, to make transfers of supplies, appliances, furniture, etc., between university offices.

Since the College of Business location was furthest away, they drove there first, travelling through downtown College Station to enter main campus. The first four filing cabinets were off-loaded at F.W. Taylor Hall, the Business College, without incident and they returned to the athletic complex for the second load. The next three cabinets were then delivered to the Agriculture building, located just several hundred yards away from the field house/stadium area across a large, empty field used for parking during football and basketball games. The final delivery site was a former storefront one block off East Main Street in College Station and about 6.5 miles from the Agriculture building, again requiring travel through suburban apartment complex and townhouse areas and then through town nearly to the main campus entrance.

As he was approaching the first stop light in town, Charlie, who was driving, suddenly applied the brakes to avoid colliding with a car entering the street from a supermarket parking lot without stopping at the stop sign located at the parking lot exit. The area is posted as a 25 mile per hour zone. Charlie admitted on his incident report filed that day that he was driving approximately 30 miles per hour. A police report completed on the incident estimated his speed at 28-32 miles per hour. The car that caused the incident sped off before Charlie or Mike

With quick reflexes, Charlie avoided hitting the car but when he stopped suddenly the filing cabinet in the truck bed was ejected over the rear panel onto the curb, smashing a USA Today newspaper stand and severely damaging the filing cabinet beyond repair. Charlie and Mike radioed the office, returned with the ruined cabinet to Buildings and Grounds, reported the accident to their supervisor and filed an incident report as required. The cabinet was junked and the University agreed to pay the owner of the newspaper dispenser $125 for repairs.

Following an investigation including an interview with them, the Manager of Buildings and Grounds wrote a letter to each of the Ipcresses on July 21, directing them each either to remit $130 (half the cost of a new filing cabinet and the newspaper stand repair cost) within three days or serve the equivalent time off -- two days -- as a suspension without pay. The letter charged the Ipcresses with "failure to follow good safety practices, negligence in care of equipment, gross carelessness, and failure to use basic common sense reasonably expected of any employee."

Charlie Ipcress has been employed by State University for nearly three years; Mike has been employed for just over two. Both have received "satisfactory" ratings in "Safety" on their annual performance reviews. Both occasionally drive University vehicles in the course of their employment. Both have completed the University's defensive driving course, mandatory for anyone who must drive a university vehicle, as well as the Buildings and Grounds division mandatory safety training. The safety training program is a general one emphasizing over-all safe work practices and safe lifting techniques to avoid back injury; there is no specific training addressed to loading vehicles. Charlie has had two oral warnings for lateness and absenteeism and one written warning for unsatisfactory work on a grounds crew job; Mike has had one oral warning and two written warnings for carelessness.

The Ipcresses failed to make restitution, saying they could not come up with the money and refusing the University's offer to deduct the amount owed from their next three pay checks. They were each suspended for two days effective July 26. On that same day, they filed grievances with their Union steward protesting the suspension.

PERTINENT PROVISIONS OF THE AGREEMENT AND/OR RULES

ARTICLE XV "MANAGEMENT"

The Employer shall have the right to manage and direct the working forces including the right to schedule and assign the work to be performed and the right to hire or re-hire, transfer, promote, demote, layoff, and recall employees and to suspend, discharge, or otherwise discipline employees for legitimate and sufficient cause.

SHOP RULE 20 (promulgated unilaterally by the Employer)

Safety meetings must be attended by employees unless they are on sick or vacation leave. Safe work practices, for which employees will be trained and held accountable, are considered to be mandatory work requirements of every job.

SHOP RULE 27 (promulgated unilaterally by the Employer)

Employees are responsible for exercising due and reasonable care for the

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Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

SHED SPREAD

Charles P. Rowe, nicknamed "CPR" by his friends, is a member of the Board of Directors of the Genesee County Red Cross and a certified Red Cross CPR instructor. He became interested in Red Cross/first aid work in the community as a result of his service as a medic in Vietnam. Rowe is employed as a Custodial Work Operator (CWO) at the Batavia Maintenance Shed of the New York State Thruway Commission.

Maintenance Sheds are located approximately every 25 miles along the Thruway. Custodial Work Operators take care of the shed building and grounds; operate the radio at the shed; patrol the portions of the Thruway assigned to the Shed to identify or inspect road maintenance problems and serve as first responders in the event of accidents, injuries or illnesses. Whenever an emergency arises on a Shed's designated portion of the Thruway, the CWO, if available, is dispatched to the scene and, as needed, assists the injured or ill person, determines manpower and rescue needs, establishes traffic control, lands emergency helicopters, and provides emergency first aid. Red Cross Basic First Aid and Adult and Child CPR certificates are requirements for employment as a CWO and re-training to keep certificates current is provided by the Commission. On average, approximately 100 calls requiring CWO emergency first response services are received at the typical shed each year.

For more than 18 years spanning the past five contracts, the CWO position had been staffed at each Shed on every shift unless it was totally infeasible to do so because no employees in the required classifications were available. This occurred rarely because under the terms of Article IX, Section 11, the Commission has the right to assign an overtime shift to the employee currently working with the least seniority when an overtime opportunity is refused by all others.

Because staffing at any particular time at any given shed depends on unpredictable factors such as the weather, employee illness and vacations, overtime is a frequent occurrence. Equipment Operators, who drive snow plows, cinder trucks and other maintenance vehicles are regularly asked to work two and sometimes three consecutive shifts during weather emergencies. Employees inside the Sheds work overtime less frequently than the Equipment Operators, but CWOs do frequently work part of an overtime shift and sometimes work a full second shift, or 16 consecutive hours. On relatively rare occasions, CWOs have been asked to work longer, sometimes as long as three consecutive shifts.

Because of its high cost and the Commission's inability to employ regular additional maintenance employees because of state budget problems, controlling overtime is a major concern of the Thruway Commission. Last month, the Commission unilaterally announced and implemented a new management policy directing supervisors at the various Maintenance Sheds not to fill the CWO position during non-critical shifts when the CWO who would, by seniority, be assigned to cover for an absent CWO had already worked 16 consecutive hours.

Critical shifts are routinely considered to be the 4:00 p.m. - midnight shift on Fridays and Sundays, as well as those occurring in bad weather conditions, during major Thruway construction, or any other circumstance when potential safety problems can be reasonably anticipated. According to the Commission, the new policy was motivated by concerns for health and safety, efficiency, and economics.

Under the new policy, rather than assigning such employee to work more than 16 hours consecutively, the supervisor was directed to notify the Thruway headquarters communications center that no first response capability was available in that Shed's area of operations. If emergency first response services were required, they would be considered the assigned responsibilities of CWOs on duty at geographically contiguous Sheds, with the exact assignment depending upon the location of the emergency and the availability of personnel at the time.

The Union objected to the policy as soon as it was announced. At a statewide "meet and discuss" session called to consider the issue, Thruway management listened to the Union's concerns but responded that the Management Rights article, the exclusive right to determine overtime needs, and Article XI, Section 4 gave management the right to assign first response work from other Sheds when bona fide needs occurred. Undisputedly, it has always been the case at a major emergency that CWOs -- and others with first response qualifications -- might be directed to the scene from numerous Sheds. Similarly, if a CWO were not available at his or her own Shed when an emergency requiring first response arose because he or she was already assisting at another emergency, an available CWO would be assigned from the nearest neighboring Shed. This explanation was not satisfactory to the Union, which said it would grieve at the first instance Thruway management applied the policy to deprive a CWO from contractually established overtime.

On December 16, a major blizzard struck Genesee County. Charlie Rowe was working his regular 8-4 shift. Impassable roads around her home prevented the CWO on the 4-12 shift from getting to work so Charlie was asked to remain for the second shift and he agreed. The regular CWO on the third shift was at the delivery room at the local hospital with his wife, who was in labor. Charlie said he would stay for the third shift, but the Supervisor instead refused to fill the CWO position at the Batavia Shed under this new policy rather than offer him an additional overtime shift. The Supervisor notified Thruway headquarters and the CWOs at the Scottsville (east) and Bowmansville (west) sheds were put on notice they may have to serve as first responders in any emergency arising in the Batavia operations area. A truck-car collision and traffic jam did require the Bowmansville CWO to perform first response duties within the Batavia operations area at about 7:15 a.m.

The next morning, the Union filed a grievance protesting implementation of the new policy with Charlie serving as Grievant.

PERTINENT CONTRACT PROVISIONS

ARTICLE II Management Rights

Section 1: Except as expressly limited by relevant statues and codes or provisions of this Agreement and reserving unto the Commission any and all management rights which, by law, may not be bargainable, the Commission shall have and retain, solely and exclusively, all other managerial responsibilities, power and authority, which shall include, but not be limited to: the right to establish policies; . . . to determine the number and types of employees required and to assign work to such employees in accordance with the operational needs of the Commission; and to direct the work force, except as expressly modified or restricted by a specific provision of this Agreement.

Section 2: The listing of specific rights in this Agreement is not intended to be nor shall it be considered restrictive or a waiver of any of the rights of management not listed and not specifically surrendered herein whether or not such rights have been exercised by the Commission in the past.

ARTICLE VIII Hours of Work

Section 1: The Commission reserves the exclusive right to determine work schedules.

ARTICLE IX Overtime

* * * * *

Section 2. When the need for overtime arises, the Commission shall assign overtime from a list of qualified employees within the job classifications who normally perform such work at the location on the basis of their status on the overtime seniority list. . . .

Section 3. It is understood that the Commission retains sole discretion to determine the number of employees, if any, within each classification that shall be used on overtime. Moreover, nothing in this article is intended to restrict the Commission's right to limit work assignments to qualified employees.

Section 4. When a situation occurs that imposes a proven hazard to public health, safety and welfare, it is agreed that any employee shall be assigned to the abatement of that hazard, regardless of whether the work is overtime or not, without violating this Agreement.

* * * * *

Section 11. In a twenty-four (24) hour operation, if the Commission experiences difficulty in obtaining a replacement for any work shift, they will call employees using the seniority system. If no employee accepts the assignment, it shall be offered by seniority to employees at the work site. In the event they refuse, the least senior employee shall remain as the replacement.

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Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

THE B.U.S. TRANSFER

On November 27, Eleventh Grade English teacher Wanda Sneath notified the Superintendent of Briarwood Unified Schools (B.U.S.), that she wished to resign and retire effective Friday, January 29, the final day of the first semester, due to ill health. Her letter came as a complete surprise. At the close of school the previous June, following accepted procedures in the district, Sneath had submitted a preliminary "Letter of Intent to Retire" effective at the end of the next academic year. She had been absent a total of 96 days in that school year, including all of the last eight weeks.

In addition, Sneath already had missed 40 days in the current fall term when she decided to retire a semester early. This level of absence had caused serious discontinuity for her classes and numerous parental complaints. The High School Principal, Dr. Hector Protector, was actually relieved that she had decided to retire. The only positive feature of the problem was that Victorial Swamp, a "permanent substitute" who had taught in the spring term last year for the Tenth Grade English teacher, who was on maternity leave, had sometimes filled in during the current fall semester for Sneath. As a result, the Eleventh Grade students at least had the continuity of sometimes being taught by the same person they had for half of Tenth Grade English.

On December 3, the District posted notice of the anticipated vacancy as required by the Agreement: "ANTICIPATED VACANCY - Eleventh Grade English. Must be certified. Position to start Second Semester. If interested, apply in writing by 4:00 p.m., December 8." Three teachers submitted applications for transfer. But when Dr. Protector identified the moves required to fill the initial vacancy and successive vacancies as applicants 'bumped' into new positions, he became extremely concerned about the impact of the requested mid-year transfers.

After careful consideration, Dr. Protector's judgment was that the needs of the students would be best served if Victoria Swamp were assigned to Eleventh Grade English for the second semester. In contrast, if the requests were honored, Swamp might possibly move to a junior high opening created by the transfers. Alternatively, the junior high vacancy would be filled by a junior high reading teacher already instructing on an emergency certificate and the District had serious concerns about its ability to find a qualified replacement even on an emergency certificate. Swamp was not certified or qualified to teach reading.

In addition, implementing the requested transfers at mid-year would have required termination of a new one year course in journalism for Tenth Grade after only a half year because the developer and teacher of that course was the likely candidate to assume Sneath's Eleventh Grade English schedule through transfer. And the Ninth Grade English teacher who would likely move to the vacated Tenth Grade English position was the key player in the District's effort to upgrade Junior High English instruction in writing. She had been sent for special summer institutes in composition at District expense.

After evaluating the situation, Dr. Protector advised the Superintendent of his view that the transfers would cause too much disruption in the educational program and recommended that they not be implemented until the following fall. The Superintendent agreed and wrote to the three applicants informing them of the District's decision to assign a permanent substitute to Eleventh Grade English for the remainder of the school year and to declare the Eleventh Grade vacancy and honor requested transfers effective at the beginning of the next academic year. Her letter explained:

> The Board and Administration do not feel it is in the best interest of the students to allow the number of teacher transfers resulting from 'bumping' (based on seniority under 'Vacancies-Transfers', Article XIII of the Professional Employees contract) due to the negative effect on students of these particular mid-year transfers.
>
> I wish to emphasize that this decision is not based upon mere administrative scheduling inconvenience. Rather, we are faced with the choice of providing instructional continuity to a whole class of students whose education has been disrupted over two academic years or causing even further disruption.

On behalf of all three transfer applicants, the Association immediately filed a group grievance at the final step of the grievance procedure. The parties agreed to process the grievance through their expedited procedure.

ADDITIONAL UNDISPUTED FACTS

1. All teachers applying for transfer were judged by the Administration to be qualified. Positional preference would be decided by the seniority of the applicants.

2. The District has not denied requested transfers of qualified teachers in the past.

3. The parties have an expedited grievance procedure and expedited arbitrator roster in their Agreement. Under the procedure, cases with pressing time deadlines are referred directly to the last step in the grievance procedure and are heard at arbitration within 30 days if the grievance is denied. Expedited arbitrators are required to give brief written decisions within two weeks of the close of the hearing.

4. Permanent Substitutes are temporary employees hired for one or two semester appointments who fill in as assigned by the Administration when regular teachers are absent, particularly in the case of extended absences and leaves.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE XIII "VACANCIES -- TRANSFERS"

A. Request for Transfer

The Board recognizes that it is desirable in making assignments to consider the interests and aspirations of its professional employees. Requests by a professional employee for transfer to a different class, building, or position shall be made in writing, one copy of which shall be filed with the Superintendent and one copy of which shall be filed with the Association. The application shall set forth the reasons for transfer, the school, grade or position sought, and the applicant's academic qualifications. The Board and/or administration shall act upon such request after receipt thereof and shall not unreasonably deny any such request. The criteria for adjudging unreasonableness shall include but not be limited to the employee's seniority and time of request, as well as availability of position requested.

Elementary transfers approved during a specific school year shall take place the following school year.

B. Posting of Vacancies or New Teaching Positions

1. During the School Term

The Board agrees to fill all vacancies hereafter, including vacancies in supervisory positions, evening school, summer school, federal projects and other programs from within its own professional staff whenever possible. Whenever a vacancy or new position arises or is anticipated the Superintendent shall promptly post notice and notify the Association of same before the position is filled. Vacancies shall be filled on the basis of experience, competence, and qualifications of the applicants, length of service in the district, and other relevant factors. The Board retains the prerogative to make final employment determination.

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Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

WORKING OUT THE BUGS

Because of declining enrollment, the Wentworth County Unified School District has been reorganzing and consolidating its operations for a number of years. A new fiscal crisis led to the decision to close additional school buildings and the Superintendent and Board determined in early spring to eliminate the bargaining unit position of Head Custodian in the school buildings which would remain open.

In early and mid-April Assistant Superintendent Dwight Strunk began officially informing the Head Custodians that their jobs were going to be eliminated effective July 1 and that they should begin preparing to excercise their contractual bumping rights. Strunk and the Buildings and Grounds Director began to develop a staffing plan projecting how the bumping provisions of the Agreement would be applied to the 18 Head Custodians affected. The bumping could produce a complicated situation since each of the 18 Head Custodians could bump into positions and each of those affected persons might themselves be able to bump, etc. The District then established and announced a ten day period during which all incumbent Head Custodians could submit bumping bids, followed by a second ten day period to process all bids resulting from those bumps, followed by a final ten day period to handle any remaining staffing issues.

On Monday, May 15, the first day of the initial bumping period, Head Custodian Gordon Strachan submitted a proper bid requesting a bump from Head Custodian at Wentworth East Middle School to the position of Maintenance I - Grounds/Landscape. Strachan could have bumped into a General Custodian position at Southside Elementary that paid more money than Grounds/Landscape. However, General Custodian was a different job category from Head Custodian and the most junior General Custodian also junior to Strachan worked night shift. Strachan needed a day shift job because his wife worked odd afternoon and evening hours as a waitress and they had a young family.

In a conference with Strachan Monday morning when his bid was submitted, Assistant Superintendent Strunk checked the seniority list and then indicated that the bid would be executed "unless there are some bugs that I don't know about." The incumbent in the Grounds/Landscape position, Martin Craig, was junior to Strachan and also the junior employee in the Maintenance I job category. But when Strunk checked with the Director of Buildings and Grounds to confirm Strachan's bid, he was reminded that the Grounds/Landscape position involved mixing and applying pesticides and therefore required a State license.

Right after lunch, Strunk went to Strachan's work site to ask him if he had a state license to apply pesticides. Strachan did not, but said he would certainly be willing to study for and take the examination at the earliest possible time. Strunk told Strachan that he didn't know if he could qualify for the bump because the Grounds/Landscape position required a license and advised Strachan to try to take the examination as quickly as possible. Strunk said he'd get back to him as soon as he consulted with the Maintenance Committee of the School Board.

Since a meeting of the Maintenance Committee was scheduled that evening, Strunk took to the Committee the matter of Strachan's bump. The Board Committee decided that Strachan would have to hold the license in order successfully to bid on the job because of the state licensing requirements. The Committee told Strunk to inform Strachan that if he could take the State-administered test and get the license by the end of the final bumping period (i.e. within 30 days), the School Board would permit the bump to take place. Otherwise, he would be prohibited from bumping into the position. Strunk called Strachan at home that evening to tell him.

Strachan did contact State offices the next day to determine how to secure the home-study book and schedule the examination. However, he also found out he would have to travel to the State Capital to take the examination (225 miles), which would have required taking two vacation days, and that the examination was only offered every ten weeks and had just been given two weeks ago. Strachan told Strunk that he could not take the examination before the deadline set by the District but that he was willing to take it at the earliest opportunity and even willing to take two vacation days to do so.

Strunk replied that, unfortunately, without a license Strachan could not be considered equal in ability to Craig and that Strachan did not meet the requirements of the position. Strunk told Strachan he had no choice but to refuse the bid.

Strachan thereupon submitted a successful bid for the unwanted night General Custodian position in order to maintain his employment with the District and immediately filed a grievance.

ADDITIONAL UNDISPUTED FACTS

1. While very disturbed at the decision, the Union does not dispute the District's right to eliminate the Head Custodian position.

2. Martin Craig bid into the Grounds/Landscape position three years ago and was awarded the job over two senior bidders because of his qualifications, which included landscape experience and possession of a Private Applicator Restricted Use License. He had previously worked part-time for a summer season for a lawncare company. The Union did not grieve the awarding of the job to Craig.

3. The "Qualifications" section of the revised job description for Grounds/Landscape position which became effective last July requires:

> Holds appropriate licenses or certifications associated with pesticide application and has knowledge and experience in landscaping and the care and maintenance of trees and shrubbery.

Prior to last July, when the District completed a comprehensive revision of all job descriptions, the job description for Grounds/Landscape made no explicit reference to licensing requirements, although the fact that Craig had a license when he bid on the position was considered to have made him more qualified than the two senior bidders, who did not.

4. Effective last January 1, a new State law requires all employees of public and non-profit institutions who mix or apply pesticides in the course of their employment to possess a newly created Commercial Applicators License by July 1. The statute exempts incumbent employees in such positions who hold the older Private Applicator Restricted License until their current licenses expire, at which point they must have qualified for the new license.

5. Martin Craig still has 18 months on his Private Applicator Restricted License. Nevertheless, with the encouragement of the District, he has begun studying to take the Commercial Applicator examination and plans to do so sometime before the end of this year.

5. Gordon Strachan had taken a groundskeeping/landscape course as part of his vocational agriculture curriculum in high school. He lives on and works a small farm and, in the course of doing so, has occasion to plant trees and other vegetation as windbreaks and to apply pesticides.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE I "Management Rights"

A. The Union through its officers and members shall not interfere in the rights of management in the matter of hiring, transfer and promotion of employees or in the general management of its business insofar that the rights of the employees as defined in this agreement are not adversely affected.

ARTICLE V "Seniority - Promotion and Transfer"

A. In matters affecting transfers, demotions, promotions, seniority shall be the determining factor along with other factors; namely - ability, aptitude, and physical fitness. When all qualifications are equal, seniority shall be the controlling factor.

B. Job Posting and Bidding

1. All jobs shall be posted on the bulletin boards of each unit within five (5) working days of the vacancies as they occur for a period of five (10) work days and shall include a general description of the duties.

2. In determining eligibility for job assignment, regardless of group or area, seniority shall be the controlling factor when all other qualifications are equal.

3. Employees must place their bid for the job desired during the posting period. Bids may be withdrawn during the period; however, if the job is awarded following the posting period, the employee must accept the assignment.

District must put successful bidder on new job within five (5) work days. District shall post information on who bid job and who received job on bulletin boards within (5) work days in each school unit.

4. Employees transferred from one group to another, or to a job with the same group, shall be allowed a reasonable period to qualify for the new job; provided that the District shall not be required to continue the trial period if it is indicated that the employee cannot meet the requirements of the job.

C. Job Bumping

Job bumping shall be permitted when an employee is displaced from a job, either temporarily or permanently, because of the elimination of his or her job assignment, temporary or permanent reduction of the work force or the reconstitution of job assignments, subject to the following conditions:

1. The employee must exercise the bumping privilege within ten (10) days of notification of the elimination of the job.

2. The employee shall be permitted to bump anyone under him or her in seniority in his or her respective job category. If the employee elects to bump outside his or her respective job category, he or she must bump the most junior employee in that category.

3. If the bump is of a temporary nature, the employee must be qualified or be able to qualify within five (5) working days from the date of assignment.

4. Employees who exercise a temporary bump shall return to their former permanent job assignment when it becomes available.

5. Employees who bid successfully on a permanent job vacancy following a bump shall relinquish all rights to the employee's former job.

30<90 ⇒ 6. Employees bumping on a permanent basis shall be allowed a period not to exceed ninety (90) days in which to qualify for the new job; provided that the District shall not be required to continue the trial period if it is indicated that the employee cannot meet the requirements of the job.

7. Employees who exercise their bumping privileges shall receive the rate of the job to which they bump.

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Department of Industrial & Labor Relations
Indiana University of Pennsylvania

THE BULLETIN BOARD

A private sector company is experiencing a severe theft problem. In its zeal to solve the problem, it posts on bulletin boards a notice stating that it will be calling employees in for questioning and anyone who refuses to respond will be disciplined.

The union, upset at this draconian approach and concerned about informing employees of their rights to be represented in such interviews if discipline for them is a possible outcome, posts a notice on the "Union Bulletin Board" decrying the company's announced plans as "gross and unwarranted intimidation," asserting the union's view that discipline for refusal to answer questions would not be for just cause, and advising workers "not to participate without first demanding union representation."

The Company representatives, enraged by this confrontational communication, tear it down from the Union Bulletin Board. The contract provides that the Company will supply a bulletin board to the union "for the announcement of meetings, election of officers, and any other material related to Union business but the Union shall not post material detrimental to the labor-management relationship nor of a political or controversial nature."

QUESTIONS FOR REFLECTION

1. What contractual issues are raised by these circumstances?

2. What is each party's "theory of the case" - its strongest contractual argument?

3. What are the interests of each party in the <u>situation</u> that precipitated this grievance (as opposed to the grievance issue itself)? (Be as specific and complete as you can.)

4. What are their shared interests?

5. What is each party's Best Alternative to a Negotiated Agreement (BATNA)?

6. Can either party do anything to change the BATNA calculation of the other?

7. What, if it happened, would make the grievance issue disappear? Do the parties' interests permit making that happen rather than pursuing the grievance issue?

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Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

AN INITIAL REFUSAL

On April 11, about 30 minutes into the shift, newly hired HouseKeeping Supervisor Janice Sheldon asked Lyla Brown, a custodian, to remain at the end of the shift and work overtime. Brown said she could not work overtime that night. Sheldon agreed that Brown had the right to waive the overtime opportunity based on her seniority.

About 15 minutes later, Sheldon brought a work roster for April 5 with "REFUSED OVERTIME - 1st Refusal" marked beside Brown's name and asked her to initial it. Brown, a recently elected shop steward, has been an employee for 10 years, has a good work record, and no disciplinary record except for a few oral warnings for lateness and absenteeism. She said she had never before been asked to sign for an overtime refusal. Sheldon explained that she was introducing the new procedure in her department for accurate record-keeping and as evidence that overtime had been offered in accordance with the contract. Brown said she would affirm at any time that she turned down the overtime and would be happy to say so in front of the Chief Steward or any other witness Sheldon preferred.

Sheldon then told Brown: "You have no right to interfere with our record-keeping. This is a reasonable supervisory request and I'm now giving you a direct order to initial the roster. I will consider it insubordination if you refuse and you will be disciplined."

"I've never had to sign before," Brown said. "Unless you can show me some rule that we must, I'm not signing what you wrote." Sheldon responded, "I can't have you interfering with my job and I can't have you setting this kind of example. Shop Stewards, especially, should understand insubordination. I'm suspending you for the rest of this shift. Clock out."

PERTINENT PROVISIONS OF THE AGREEMENT AND/OR RULES

ARTICLE X "MANAGEMENT RIGHTS"

A. The control of all matters concerning operations and management are the exclusive responsibility of the Employer, subject to the provisions of this Agreement. Management has the right to discharge, suspend, or otherwise discipline employees for cause.

B. It is understood that Management has the right to make reasonable rules and that the Union has the right to grieve the application of such rules if it believes they are being improperly applied. The Employees shall comply with the Shop Regulations attached hereto and made a part of this Agreement.

SHOP REGULATION 9

The following are examples of conduct giving legitimate cause for suspension without pay or discharge: refusal to obey orders from a supervisor; refusal to accept instructions on how to perform a job; . . ..

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Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

WHAT'S THE EMERGENCY?

Ron Ford has been employed at the University for three years as a Custodian in Pavarotti Hall, a huge performing arts facility. He bought a new house when he got remarried two years ago but has been unable to sell his old house because of the local economy. His wife was laid off seven months ago and has been unable to find work. They couldn't make ends meet and the insecurity was threatening their marriage.

The old house had just been given to the latest realtor. On the evening of November 9, the realtor called to say she thought she had a buyer, who wanted to look at the house at about 10:00 the next morning. Since he had to work and his wife was visiting her mother, Ford arranged with the realtor to leave the key under the front door mat.

Tremendously excited, Ford left for work the next morning and forgot to leave the key. It was an extremely busy day because the Broadway show "Cats" was playing in the auditorium that evening and all of the Pavarotti Hall custodians plus all others who could be spared were working feverishly to have the facility prepared. The set trucks and construction crew had arrived four hours late and the chances of being ready by the 8 p.m. performance time were slim.

At about 9:30 a.m., Ford discovered the key. He called the realtor but she had already left her office. The house was a 10 minute drive from campus. Ford searched for the supervisor but could not find her. In a panic, he left a note on her desk:

> Ms. Kuhlman -- I need permission to leave for an emergency. I forgot to leave the key to my old house for the realtor and he has a buyer who needs to see it this morning. I should be back in 25-30 minutes. It's ok if you have to dock me.

Ford arrived just as the realtor did, met the prospect, passed on the key, and returned to work. He was gone about 25 minutes. Soon after his return he saw the supervisor and asked if she'd gotten his note. She hadn't, but said she would read it when she got to her office.

When Kuhlman read the note, she was outraged. In the 25 years she'd been at the University, only two other custodians had left work without permission as far as she could remember: one man's wife had just been killed in an accident and one woman got a call that she had a gas leak at her house; neither was disciplined. Kuhlman returned and handed Ford a memo stating that he was being docked 30 minutes pay and was being suspended for three days for "leaving work without permission." "You knew how busy we were," she berated him, "leaving -- especially without permission -- was outrageously irresponsible. If that's all you think of this job, maybe we should find someone who will appreciate it."

PERTINENT PROVISIONS OF THE AGREEMENT AND/OR RULES

ARTICLE XIV "JUST CAUSE"

> The Employer may discipline or discharge employees only for just cause under the theory of progressive discipline.

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Department of Industrial & Labor Relations
Indiana University of Pennsylvania

IMPASSE AT THE LINE OF SCRIMMAGE: A LABOR MEDIATION CASE

Negotiations for a new three year contract between the School District and the Teachers' Association to become effective in September, 1989, had been dragging on for months. By mid-July, the parties had tentatively agreed on a few items but never reached big issues such as salary. For the past four negotiating sessions they had dealt with a single issue: athletics. Each believed they would be able to reach agreement on the economic issues, even though that would be difficult, if they could get beyond the athletics stalemate.

The District and the Association had exchanged complete good faith proposals three times before each party became frustrated and frozen in its position. The District insisted that the new Agreement recognize the School Board's exclusive authority to hire coaches, including non-bargaining unit members. The Association responded that express recognition was unnecessary: obviously, the Employer had the right to make the hiring decision; the Association was only interested in insuring that qualified individuals were employed in what it considered important non-classroom teaching functions. The District responded that the School Board must be recognized as the judge of qualifications. The Association countered that the District then should be willing to specify the qualifications and the manner in which applicants would be judged to insure against arbitrary decisions.

In early August, the Association played what it believed was its trump card, asking the District for a copy of its policy on coaching and interscholastic athletics. The District said it had no formal policy but had been in the process of developing one for several years. The Association then gave the District a copy of the State Board of Education policy on coaching, outlined below. According to the document, District policies have been required since July, 1981.

Calling the District's athletics program officially "substandard" and charging that the District was courting disaster in terms of liability for injuries, the Association made what it characterized as its "final proposal" on the issue, outlined below. Another session was scheduled several days later to receive the District's response.

At the next bargaining session, the District acknowledged that it was required to have a policy and that past Boards had apparently failed to adopt one. It indicated that it would adopt a policy prior to the opening of school. It then gave to the Association its "final proposal" on the issue, also outlined below. Neither proposal was acceptable to the other party and, with frustration mounting, each told the other that there could be no further movement until the athletics issue was resolved.

The Association said it would strike and the District said it would take a strike. Privately, both acknowledged that there would be no community support for a strike delaying the opening of school -- and football season. The only matter for speculation was whether the populace would direct more wrath toward the School Board or toward the Association. The parties reached impasse and a mediator entered the negotiation in this crisis atmosphere in mid August.

BACKGROUND

Several background factors influenced the behavior and positions of the parties as the impasse developed:

1. The District was in an economically depressed region. Population had been rapidly declining for two decades and virtually all industry had left. Finances were difficult and major problems lay ahead as both the school-aged population and tax base continued to decline. Tax increases and teacher lay-offs appeared inevitable, making the political future of each School Board member tenuous at best.

2. The District has been known in the past for excellent sports teams and both football and basketball enjoy tremendous community support. A large billboard outside the high school welcomes students and visitors to the "Home of Champions" and lists the District's state championship football and basketball teams. The most recent championship is football in 1962-63. In the last 4 years, the football team had only one winning season and the basketball team has barely broken .500. Still, sports seem to be the one activity that held the entire community together and both football and basketball games are regularly attended beyond capacity by very enthusiastic crowds.

3. For many years, the School Board has left the Administration free to run day-to-day affairs but has always been highly involved in teacher and extracurricular appointments. It has been widely assumed that to get a coaching post, one has to know the "right people" on the Board. The Board's internal athletic politics rose to the level of abuse five years ago, causing a major nepotism scandal in the appointment of two part-time assistant coaches who were not teachers.

4. The scandal led the Association to insist on some measure of control in the appointment of coaches when bargaining for the current three year contract and the Association was successful in negotiating considerable limitations on the Board's previously unqualified ability to hire and fire extracurricular appointees. The article in the current contract was a high Association priority and was negotiated only after protracted, very bitter bargaining sessions. No member of the current Board was serving at that time and the Board acknowledges that the conduct of former Board members was highly improper.

5. Of the nine current School Board members, four are actively involved in sports -- a little league baseball official, a YMCA swimming coach, an officer in the football boosters club, and the president of the County's "Sports Hall of Fame." Two other Board members, both retirees, are revered as local high school sports heroes from days gone by. Three current Board members, including one member of the bargaining team, ran successfully in last year's election at least partially on the "platform" of bringing back winning teams.

6. Of the six Teachers' Association bargaining team members, two currently are coaches and two are assistant coaches of junior or senior high sports. The Association's chief spokesperson is an assistant junior high basketball coach. The Association's president is the former high school head football coach who was relieved of his position at the end of the second year of the last three year contract, through the provisions of Article XI,C(3), after two consecutive losing seasons. The removal generated a high level of community reaction.

7. There are rumors that two people in the community are supported by some Board members as candidates for part-time Head Coaching positions. One is a local insurance agent who grew up in the District, was a star football quarterback on the state championship team 30 years ago, and went on to be a star quarterback at State University. The other is the owner of a car dealership who also grew up in the community, was a star basketball player, and went on to star on the State University team that went to the National Tournament 15 years ago.

8. By law, the School District has the authority to contract for extracurricular services and extracurricular activity advisers, including coaches, need not be members of the bargaining unit. The District's right to hire part-time personnel for extracurricular duties is unfettered except as modified by the Agreement.

CURRENT CONTRACT LANGUAGE: Article XI, Section C - Athletics

1. The District will hire personnel with proper qualifications, as determined by the District.

2. When a position is created or vacated, members of the bargaining unit shall have the right to bid. Should no bargaining unit member bid, the board shall have the right to hire a person outside the bargaining unit to fill said position.

3. At any time the board unilaterally increases the rate of pay for any position, said position shall be declared open and posted for bid by members of the bargaining unit.

4. The District reserves the right to discharge for just cause any persons who perform the duties of any extracurricular assignment. Discharge for just cause shall be subject to the grievance procedure.

SCHOOL DISTRICT PROPOSAL: Article XI, Section C - Athletics

1. The District will hire personnel with proper qualifications, as determined by the District.

2. For the first year of this Agreement, all extracurricular positions will be declared open.

3. Applications will be accepted and the positions will be filled using the following guidelines:

a. The position will be posted internally for five (5) days.
b. All applicants will be considered.
c. Coaches will be selected by the Administration from internal applicants provided the Administration believes their qualifications are acceptable.
d. In the event the internal applicant(s) are not considered to have acceptable qualifications, the District will advertise externally for ten (10) days.
e. At that time, all applicants, internal and external, will be considered using the following process:

1) The superintendent, building principals, and athletic director will interview the applicants and review their credentials.
2) The Association president will be invited to attend and observe these interviews.
3) A nominee will be selected by majority vote.
4) A nomination will be submitted to the Board for ratification.

ASSOCIATION PROPOSAL: Article XI, Section C - Athletics

1. The District will hire personnel with proper qualifications. The District shall have the right to select from among the applicants the person most qualified for the position. In the event that qualifications of applicants are equal, applicants who are members of the bargaining unit shall have preference over outside applicants.

2. To be considered "qualified," an applicant must provide evidence of the following:

a. Holds a valid teaching certificate or has participated in the sport.
b. Holds a valid teaching certificate or has acquired knowledge of the sport through formal study at clinics, workshops, inservice programs, etc.
c. Holds a valid teaching certificate or has earned a minimum of six (6) college credits in the methods of teaching appropriate to the age of the students participating
d. Holds the following certificates and credits:

1) American Red Cross First Aid and CPR
2) Minimum of 3 college credits in physiology
3) Completion of District-administered test with minimum score of 85% on rules of the sport, Conference rules and guidelines, and the District's philosophy on sports and coaching objectives and styles.

3. Supplemental contracts may be terminated for failure to perform the duties of the position. In instances where the District believes, under exceptional circumstances, that just cause exists for a termination, the District shall not be prevented from taking such action, provided that notice shall be given not less than 30 days prior to the completion of the activity and shall include a statement of the reason(s) for the termination. Termination disputes shall be resolved through the grievance procedure.

POLICY OF THE STATE BOARD OF EDUCATION REGARDING COACHES

(Adopted September 14, 1979)

It is the policy of the State Board of Education that all school districts adopt a procedure to ensure that employed athletic coaching personnel have the preparation in the suggested areas as soon as possible, but no later than July 1, 1981. To meet the responsibilities placed upon the coach and the school administrator for the health and safety of the student athlete, it is essential that the coaches of both male and female athletes be prepared in the following areas:

1. First aid including care and prevention of athletic injuries

This is intended to mean first aid specific to sports participation with a major emphasis on prevention and includes: Knowledge and skills to prevent and manage athletic injuries, including cardiopulmonary resuscitation; knowledge of how to safely condition athletes; knowledge of safety in the athletic environment; knowledge of safe practice and game equipment; knowledge of a coach's role in the rehabilitation process; and awareness of any existing school district policies and procedures regarding athletic injury.

2. A knowledge and understanding of the scientific principles related to training and condition for sports

Preparation in this area would include: Scientific principles as applied to strength; anatomical and mechanical principles of sports skills including knowledge of joint structure and major muscle groups as applied to mechanical principles of sports skills; muscular and cardiovascular endurance in training and conditioning for sports; knowledge and application of weight training principles; nutrition as applied to weight control and energy production; fluid intake control and loss; use and effect of drugs; and the rate and state of growth and their relationship to physical activity.

3. School/Community Responsibility

In addition to adequate preparation for coaches, school officials responsible for establishing and conducting interscholastic and intramural athletic programs need to be aware of the strong influence that interscholastic and intramural sports have upon athletes, coaches, parents and community. Interscholastic and intramural programs should be conducted in accordance with sound educational policy and should be conducted to teach and reinforce the values of hard work, team play and vigorous competition.

It is essential that athletic programs are supervised and conducted by personnel who know about and understand the school and community forces that exert pressure upon participants and spectators. Coaching is specialized teaching and coaches need technical expertise to develop sports skills among participants. However, lessons to develop courtesy and sportsmanship should not be overlooked by anyone associated with interscholastic and intramural athletics -- including spectators.

MEDIATOR'S COMMENT

"When I entered the negotiation, tensions were running very high. Each party was highly accusative, charging the other with causing the impasse and not having the best interests of the students in mind. Each party was also anxious for me to understand the righteousness of its position and there was a high level of interest in learning my reaction to their positions. The first night, I met with them together and separately in extended sessions to learn the complete background.

"It was apparent to me that timing was important and that I would have to give the parties a specific, detailed recommendation. Each had a high level of ego and rhetoric invested in its position and neither was any longer able to take the initiative, both having declared athletics a strike issue while vigorously deriding the other for the ridiculousness of that posture.

"At the end of my first session I met with them together and told them I'd be prepared to make a recommendation when we met again in a week or so, knowing that would be within several days of the opening of school. I then asked to meet with each team separately. I told each party that I would do the best I could but, frankly, that if they could in fact not change their "final position," they'd better get ready for a strike. I expressed doubt to the Association team that they would really be able to get membership support, not to mention community support, for a strike over this issue. I also told them they should not underestimate the firmness of the District's determination to get back some control over athletic hiring and their willingness to take a strike over the issue. I asked the teachers to think about how much protection they really needed and how much would be acceptable.

"The District team had told me they didn't believe the teachers would strike and considered that threat an empty bluff. I told them I believed that the Association was intent on keeping this issue as a trip-wire for the entire contract and pointed out that, for good reasons or bad, the District bargained away the authority they were now seeking to regain just one contract ago. I expressed doubt that they could regain what they wanted all at once and suggested that if, indeed, they now saw the current contract language as a mistake, they needed to take responsibility, as the incumbent Board, for solving the problem they inherited. I reminded them that they had to come to grips with the State policy mandates and asked them to consider the cost of not beginning to correct the mistake.

"I presented my proposal to them at the next meeting, which I called for a Friday night. School was to open the following Tuesday. Meeting jointly, I told them that I certainly had no authority to make a "take it or leave it" proposal and that if they could not agree to it but could consider it the basis for working toward an agreement, I'd be happy to work with them. I also told them, however, that in my view the essential elements of the proposal represented the best that could be done by each party under the circumstances and that if it could not form at least the basis for some movement toward agreement, they might as well prepare for a stike. I then explained each item of the proposal and my rationale and asked them to retire to caucuses to consider it.

"After about 40 minutes, each asked to meet with me. Neither was thrilled. But each team seemed satisfied with its understanding of the stakes. The spokespersons told me that although their teams were not unanimous, they were prepared to make the proposal a tentative agreement and move on to salary. We began a bargaining session at 9:30 p.m. that Friday night and reached an agreement at 3 a.m. Saturday morning."

MEDIATOR'S PROPOSAL: Article XI, Section C - Athletics

1. Supplemental contracts shall be let to qualified applicants. Beginning with the 1990-91 school year: 1) supplemental contracts let to bargaining unit employees shall be for a term of three (3) school years except for assistants as provided below; 2) supplemental contracts let to non-bargaining unit personnel shall be for a period not to exceed one school year.

1. The District will hire personnel with proper qualifications and shall select from among the applicants the person most qualified for the position. In the event that qualifications of the applicants are equal, members of the bargaining unit shall have preference.

2. Applicants shall provide evidence of and the District shall give due regard to the following qualification criteria:

a. Participation in the sport;
b. Acquisition of knowledge of the sport through formal study or participation such as in clinics or workshops;
c. Knowledge of the methods of teaching appropriate to the age of the students participating in the sport;
d. Knowledge of first aid, including care and prevention of athletic injuries;
e. Knowledge of and understanding of the scientific principles related to training and condition for sports;
f. Knowledge and understanding of the relationship between interscholastic sports and school/community responsibility, including an understanding and appreciation of the influence of athletics on athletes, coaches, parents, and the community and the values to which the District subscribes and which it wishes to have taught through athletic programs.
g. Completion at a satisfactory level of a District-administered examination on the rules of the sport; Conference rules and guidelines; and the District's philosophy of sports and coaching.

3. The employment of assistants who meet the qualifications above shall be on the recommendation of the person employed for the head position in consultation with the administration. Their names shall be submitted annually to the board for employment through supplemental contracts of one school year duration.

4. The District reserves the right to discharge for just cause any persons who perform the duties of any extracurricular assignment. Discharge for just cause shall be subject to the grievance procedure.

Donald S. McPherson © 1991
Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

SHOTGUN PRACTICE

Pleasantville is a borough of approximately 3 square miles located 30 miles from a large city. The Borough and the Union have had a collective bargaining relationship since 1972 covering all regular full-time and part-time employees except police.

Pleasantville used to be a prosperous area with a bustling downtown, thanks largely to the steel mill and two other large plants within its boundaries. Many Pleasantville residents worked at the plants and the companies provided a substantial tax base. But both of the smaller plants have been closed for 8-10 years and the steel mill operates at 25% of the capacity it had 15 years ago.

Population has declined from 21,000 to 11,200 and many of the remaining citizens are pensioners on fixed incomes. The downtown has numerous empty and boarded-up storefronts. Twenty years ago, the Borough had 16 full-time and four part-time employees in the Street Department; today it has five full-time, two part-time and several "on call" hourly persons who are not regular employees. The 12 person police force has declined to two full-time and two part-time in the same period. The Fire Department was eliminated altogether and replaced by a volunteer company. The financial viability of the Borough in the long run is an open question. Merger with surrounding boroughs or townships, occasionally considered and rejected in the past, is increasingly a topic of discussion. Council continues to look at ways to reduce the Borough work force and/or to "privatize" services.

The terrain is extremely hilly, making snow removal in the winter a pressing problem and a difficult task. For as long as anyone can remember -- since before the first collective bargaining agreement -- two employee/drivers have been assigned whenever Borough trucks are used for snow removal. One employee drives the truck. The second prepares and assists with hooking up the plow and then 'rides shotgun.' The second employee has no specified duties other than preparing and installing the plow, riding in the truck, and assisting as necessary. For example, in particularly bad snow storms where the plows had to work overtime, the driver and the "shotgun" might switch at some point to give the driver a break. Although anti-skid material could be loaded by one person, both employees worked on that task when the truck had to re-load. If, for some reason, it became necessary to direct traffic while the truck was plowing out a closed road, the second employee might do that if police were not available. If unneeded, the 'shotgun' simply rode in the truck.

On November 15, as a result of a decision by Borough Council motivated by economic considerations, a memorandum was written from the Borough Secretary to the Street Crew Leader, a working foreman in the bargaining unit, notifying him that, effective December 15, only one employee was to be assigned to any truck for snow removal. The memo was sent to all employees, posted, and copied to the Union's District Business Representative.

Operationally, the Crew Leader was directed to have snow plows blocked up and positioned for loading in advance so that the driver-operator could install a plow without help. If necessary, the Crew Leader was authorized to call out a second employee to assist with installation of the plow, but that employee would not thereafter ride in the truck as a second operator. If calling out the second employee required overtime, it would be paid. If weather conditions required paying the driver overtime, it would be paid.

The local union shop steward contacted the Business Representative upon receipt of the memo and was advised to file a grievance immediately.

ADDITIONAL UNDISPUTED FACTS

1. Unless weather conditions were horrendous, it was cumbersome, but possible, for a single person to install a properly fixed and blocked plow. Depending upon conditions, this process might take up to 20 minutes if the plow were blocked up and the driver were working alone. If two employees were assigned to the truck and the plow was not blocked up in advance, it could normally be installed in 10 minutes.

2. The classification of all employees assigned to the Street Department is "Street Crew." There are no separate classifications for driver-operator and shotgun. Wage differentials for the "Street Crew" job class are a function of years of service.

3. Winter weather has been milder for the last 5 years. The Borough consistently has over-budgeted for anti-skid material. The School District has beeen closed for an average of only a little more than one snow day per year over the last five years; in the "old days," closing schools for 5-7 snow days in a year was not uncommon.

4. Crew sizes or staffing patterns for jobs have never been discussed during bargaining. Neither party has ever made a proposal. Although "safety" has often been cited in conversations as the historical reason for having two drivers, that issue also has never been raised in bargaining in the context of staffing for snow removal.

5. Both the State and the nearest City used to have two employee/drivers in trucks also. Both had staffing language in their contracts. Both have eliminated the second, 'shotgun' employee through bargaining over the last 6-7 years.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE I Recognition

Section 1. The parties understand and agree that the Borough is vested by law with the control of the operation of the Borough for the public welfare. This authority extends to the employees of the Borough and cannot legally be abrogated. Therefore, nothing in this Agreement is to be construed in any way to limit or restrict this right, and any provisions inconsistent therewith shall be null and void.

ARTICLE V Hours of Work, Overtime, and Lay-Offs

Section 1. Overtime work shall be defined as work performed in excess of eight (8) hours in any work day or in excess of forty (40) hours in a work week.

Section 2. All employees shall respond to a call out for snow removal or any emergency unless an employee has a legitimate reason approved by management.

Section 3. Any temporary or permanent reduction in force will be accomplished first by laying off part-time employees, then by laying off full-time employees, in each case in inverse order of seniority. Recall will be in order of seniority, full-time employees first, then part-time.

ARTICLE XXXII Miscellaneous

Section 6. Working conditions and practices now in existence and not in conflict with any provision of this Agreement, State law, or local ordinance shall remain in effect for the duration of the Agreement.

OTHER PERTINENT PROVISIONS

STATE PUBLIC EMPLOYEE RELATIONS ACT

SECTION 702 Scope of Bargaining

Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel.

Donald S. McPherson © 1991
Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

SAFETY FIRST

Riverside Dry-Dock Company runs a boat and barge structural and mechanical repair operation on the banks of the Mississippi River. Vessels are pulled on ways up out of the water and over the riverbank. Then, with the vessel firmly secured and resting at an angle, scaffolding and/or ladders are erected and repairs are carried out. When completed, the vessel is slid back down the ways into the river.

Because of working at heights and angles, the amount of arc welding required, and the use of heavy mechanical equipment such as cranes and lifts, the shipyard industry is one of the most dangerous in the U.S. Safety standards are heavily regulated and monitored by OSHA.

When new ownership bought the Company three years ago, they did not establish human resources, labor relations or safety functions but left these to operating managers. Within 18 months, the Company accumulated a lost-time incident rate four times the industry average as well as numerous OSHA citations and heavy fines. This led to hiring a full time safety director; formation of a labor-management safety committee; development of a comprehensive, 23 page Safety Manual, and mandatory monthly safety meetings. The Union was informed that the Company intended to "get serious" about safety violations and supervisors began disciplining employees for unsafe practices.

Sheila Miller has been employed as a journeyman welder since the new ownership took charge of the Company. Her work, attendance and discipline records were considered good; she had only one oral warning about 15 months ago for failing to wear her hard hat. Last Monday, the Yard Foreman, Bob D'Ambrosia, noticed that a group of workers apparently had climbed up on a barge using a ladder that had two broken rungs and a missing safety foot. Upon investigation, the foreman learned that Miller had placed the ladder, which was previously laying on the ground beside the barge. Other ladders in good condition were available in a storage shed about 200 yards away.

At the end of the shift, Miller was called in to D'Ambrosia's office. She did not deny she had placed the ladder. She was then counseled about the safety violation and given an oral warning. D'Ambrosia asked her if she had a copy of the Safety Manual and Miller replied affirmatively. "Good," D'Ambrosia responded, "I want you to make sure you read that manual before you clock in tomorrow."

On Thursday, D'Ambrosia was in the yard and noticed Miller lying down on a scaffold, approximately 15 feet high, properly wearing a helmet and welding a repair patch on a barge hull. D'Ambrosia called Miller down and inquired whether she knew that she was again violating safety procedures by lying down on the scaffold while welding. "Everyone does it," she responded, "it was only a 5-10 minute job, there was no point taking half an hour to lower the scaffold and then raise it again, and welding from ladders is dangerous." Angered at her attitude, D'Ambrosia retorted, "That sounds like a heavy dose of self-help to me."

D'Ambrosia then asked, "Did you read the Safety Manual like I told you?" Miller said, "Well, not the whole damn book, but I read bits and pieces. There wasn't anything that addressed this." "The hell there wasn't," D'Ambrosia responded, "what's the point of requiring hand rails on scaffolds if it's ok to lie down and defeat their purpose? We're trying to put safety first around here and you just don't get it. I told you to read the Manual. Clock out. You're suspended for the rest of today and tomorrow pending investigation. Report to my office Monday at 1 p.m. with your steward for a hearing. And make sure you've read that Safety Manual before the hearing!"

At the hearing, the new Manager of Employee Relations, Beatrice Faire, first asked Miller whether she had been welding while lying down on a scaffold in violation of proper safety practices. Miller admitted she did do a short spot weld job while lying down on the scaffold but contended that it's a common practice for short jobs and that no safety rule clearly addressed what should be done.

"Well, we think the situation is addressed," Faire replied. "I presume you've read the Safety Manual as you were instructed?" Miller asked, "What exactly do you mean by that?" Faire said, "I think it's pretty clear. Have you finally read the Safety Manual?" "Are you going to give me a test?" Miller asked. "Let's stick to my question," Faire responded, "have you read the Safety Manual?" "Not cover to cover, word for word," Miller answered. Clearly agitated, D'Ambrosia said, "You mean you've been ordered twice now to read the Safety Manual and you're still refusing to read it? I can't believe your attitude."

"I wasn't ordered to read it cover to cover and anyway I think what books I read on my own time is my business," Miller retorted. "Maybe I just wanted to wait for the movie. Besides, I told you before, nothing in the Manual addresses this case." The Union steward then asserted vigorously that the Company did not have just cause for anything more than a written warning and certainly not for a two day suspension.

After a 10 minute private meeting with D'Ambrosia, Faire announced to Miller and the steward that the Company had decided to discharge Miller for "repeated safety violations, a patently unacceptable attitude toward safety, and gross insubordination." Astounded, the steward shot back, "Better contact your big money attorney downtown right away because this one is going to arbitration for sure."

ADDITIONAL UNDISPUTED FACTS

The Company and the Union have an ongoing, unresolved dispute over whether general welding jobs of short duration can be safely done from ladders within the OSHA regulations -- which is the Company's position -- or whether they must be done from scaffolding. OSHA has not yet responded to separate, contradictory inquiries from both parties.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE III "Management Rights"

A. Management and the direction of the working forces, including the right to hire, suspend, transfer, or discharge for proper cause; the right to establish, determine, and maintain reasonable standards; and the right to introduce, change, or discontinue methods, materials and/or equipment are vested exclusively in the Company.

ARTICLE XIV "Discharge and Discipline"

A. No disciplinary action may be taken without just cause. All disciplinary actions are subject to the grievance procedure.

B. Disciplinary action shall be progressive. However, the parties jointly acknowledge that there are some major offenses for which the immediate and appropriate discipline, in the absence of mitigating circumstances, is discharge. Progressive discipline is not required in major offenses such as insubordination; fighting; intoxication or being under the influence of drugs or alcohol at work; and stealing.

OTHER PERTINENT PROVISIONS

(EXCERPTS FROM "SAFETY MANUAL AND GENERAL PLANT RULES")

A. General Employee Obligations

1. Each employee shall comply with OSHA standards and all rules, regulations, and orders issued pursuant to the act that are applicable to his or her own actions and conduct.

C. General Safety Rules

8. Ladders shall be inspected by employees before use. Cracked or damaged ladders or ladders with missing safety feet shall be taken out of service and sent to the warehouse for repair or disposal.

13. Scaffolds, platforms and decks higher than five feet from the ground or a lower surface are to be equipped with handrails, either permanent or temporary, whenever the structure or operation permits. Handrails will be used on all scaffolds exceeding 10 feet in height.

F. General Rules of Conduct

1. Compliance with all reasonable instructions is the responsibility of the employee. Inciting work stoppages, countermanding orders, resorting to self help, or deliberately violating safety rules shall be cause discipline. Insubordination is a major offense.

(EXCERPT FROM "OSHA SAFETY STANDARDS - SHIPYARD INDUSTRY")

Section 1915.77(c) -- Working Surfaces

When working aloft, employees visually restricted by blasting hoods, welding helmets, and burning goggles shall work from scaffolds, not from ladders, except for the initial and final welding or burning operation to start or complete a job, such as the erection and dismantling of hung scaffolding, or other similar, non-repetitive jobs of brief duration.

Donald S. McPherson © 1992
Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

DISCRETION: THE BETTER PART OF VALOR?

The Community College of Lake County is an institution of over 28,000 students attending classes on the college's main campus at Bath, a city of 103,000, and branch campuses Eljer and Crane. Each of the branch campuses is located approximately 25 miles from the main campus.

Although CCLC primarily serves commuter students, each of the branch campuses has two small dormitories and the main campus has one large, high rise dormitory. President Lois Valor is the chief executive officer and each branch campus has a Director who reports to Valor and who supervises all branch campus non-academic personnel. Maintenance and clerical employees are represented by the Public Employee Union.

Tyson DeBolman is the custodian for the two small, side-by-side dormitories at the Eljer campus and has been employed as a Maintenance Employee for nearly six years. Three years ago, he suffered a non-work-related illness -- a heart attack -- causing him to miss nearly two months of work. Early this year he seriously injured his back on the job and was off work on Workers' Compensation for six months. His job performance is rated "very satisfactory" and he has a good discipline record, only one letter of reprimand for a minor offense in his first year of employment. His overall manner is friendly but he gives the appearance of being a very nervous person. He takes medication for high blood pressure and becomes highly flustered in stressful situations.

Because of his extended absence earlier in the year, during which only temporary employees filled in, a substantial backlog of maintenance work accumulated. About six weeks after his return to work, the College became embroiled in a major controversy with student residents of the Eljer dormitories concerning numerous mechanical, maintenance and sanitation deficiencies, many related to poor building design or construction.

This conflict produced petitions from students and letters from their parents to President Valor, hearings by the Student Government, letters to the editor in the CCLC student newspaper, The Watering Hole, and in the Bath Post, and letters to local, county, and state officials and politicians. Besides complaining about construction deficiencies, the students also complained about DeBolman's inability to rectify the maintenance request backlog and to keep up with his ongoing duties, especially cleaning in the bathrooms and showers.

The Eljer campus Director became concerned about DeBolman's ability to continue working in this atmosphere, because of his apparent inability to prioritize the frequently conflicting demands from students and from superiors on his time. From the Director's perspective, the situation wasn't DeBolman's fault: he was not responsible for construction deficiencies and his on the job injury was entirely legitimate. The situation would be stressful for anyone, but DeBolman was a particular concern because of his heart condition and the serious injury to his back.

Responding to increasingly strident student criticism and demands for action, two of the County Commissioners appeared unannounced on campus early last Monday morning and summoned the Director to accompany them on a surprise walk-around inspection of the Eljer dormitories. The Commissioners were thronged by students eager to show them post-weekend conditions and found the cleanliness of the buildings unacceptable. Among other recommendations, they suggested strongly to President Valor that a "more capable" custodian be assigned immediately. The President consulted with the Employee Relations and Physical Plant Directors and they concluded that the Eljer dormitory assignment was more than DeBolman could handle and that he needed a new environment with closer, supportive supervision.

By direction of the President, the Employee Relations Director notified DeBolman last Friday that he was being transferred effective the following Monday from Eljer to a Maintenance Employee position in the Plant Services Building at the main campus in Bath, reporting directly to the Maintenance Manager, whose office was in the building. Missy McLean, a newly hired Maintenance Employee working in the Plant Services Building at Bath, was transferred to Eljer in DeBolman's place. Neither employee's job classification or job classification seniority, pay, or unit seniority were affected.

DeBolman took his union steward to a meeting with the Employee Relations Director arranged the Wednesday after his transfer took effect. He complained emotionally that the transfer amounted to improper discipline and unfairly penalized him because he lived less than half a mile from the Eljer campus but would now have to drive 25 miles to Bath. The Employee Relations Director assured DeBolman that the College did not consider the situation at the Eljer dormitories to be his fault. However, "something had to be done to correct the situation and respond to the complaints," he said. According to the Employee Relations Director, the Agreement clearly gives the College the unilateral right to transfer, which it exercised. The action was not disciplinary in nature and was actually "for his own welfare" and actually prevented any potential need for discipline, the Director explained. DeBolman was enraged and the union steward replied that the Agreement did not give the College the right to involuntarily transfer employees. DeBolman said he would be filing a grievance.

ADDITIONAL UNDISPUTED FACTS

1. The College posts individual Maintenance Employee positions by campus, noting the work site, i.e. "M.E./Eljer-dormitories;" "M.E./Bath-Field House;" when vacancies occur. Incumbent employees may bid on these positions according to the Seniority provisions of the Agreement.

2. When DeBolman was initially hired, he served as a "floating" Maintenance Employee assigned to fill in for absent maintenance employees anywhere on the Bath campus.

3. In the first two years of his employment, DeBolman bid unsuccessfully on two M.E. vacancies, one at Bath in the Field House and one at Eljer in the classroom building. He was not the senior bidder in either case.

4. Early in the fourth year of his employment, DeBolman successfully bid on a posted vacancy at Eljer in the dormitories. He worked in that position for four months before he suffered his heart attack.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE V Hours of Work

C. Work schedules showing the employee's shift, workdays, headquarters, and work site will be posted on applicable bulletin boards. The headquarters of an employee shall not be changed for arbitrary or capricious reasons.

ARTICLE XIII Seniority

A. Unit seniority shall mean the length of continuous service that an employee has with the Employer within the unit since his/her last date of hire. There shall be two units: a clerical unit and a maintenance unit. Job classification seniority shall mean the continuous length of service in a particular job classification.

B. Work Force Changes

(1) The term promotion, as used in this Agreement, means the advancement of an employee to a higher-paying position or the reassignment of an employee - whenever a vacancy occurs and the employee qualifies -- at the employee's request -- to a position the employee considers to be in his/her best interest regardless of the rate of pay.

(a) Internal qualified candidates will have preference over external job applicants. Whenever an opening occurs in any job classification a notice of such opening shall be posted on the bulletin boards for ten (10) working days. During this period, employees who wish to bid for the open position may do so.

(b) The Employer shall fill the opening within 10 days by promoting from among the bidders in the job classification the employee with the most job classification seniority. If no one from within the classification bids, the Employer shall repost the opening for five (5) working days for the purpose of inviting and considering transfers from other positions. If an employee transfers from one unit to another, he/she shall carry all seniority accumulated.

(2) The Employer possesses the right to transfer at its sole discretion.

(3) No demotions shall be made except for just cause.

(4) In the event it becomes necessary to layoff employees for any reason, employees shall be laid off in the inverse order of their unit seniority. Employees shall be recalled from layoff according to their unit seniority.

(5) When an employee is laid off due to a reduction in the work force, he/she shall be permitted to exercise his/her unit seniority rights to bump an employee with less unit seniority, provided the bumping employee can perform the work.

ARTICLE XIV Discipline and Discharge

A. Disciplinary action or measures may be imposed only for failing to fulfill responsibilities as an employee and shall include only the following:

(1) Oral reprimand;
(2) Written reprimand;
(3) Suspension (without pay) (notice to be given in writing);
(4) Discharge

ARTICLE XX Management Rights

It is not the purpose of this Agreement to infringe upon or impair the right of the Employer to make and place in effect its decisions concerning the operation of its business. All of the rights, powers, or authority of the Employer are retained by it, except that specifically abridged, delegated, granted, or modified by this Agreement.

ARTICLE XXI Miscellaneous Provisions

A. If an employee is assigned to work at a location other than his or her headquarters, the employer shall provide transportation for the round trip from the employee's headquarters to the employee's worksite or, if the employee is required to use his/her own vehicle, the Employer shall pay the employee the mileage fee in "Appendix A".

"APPENDIX A"

Wage Scale (Maintenance)

Maintenance Group Leader	$ 10.79/hr.
Maintenance Employee	$ 9.36/hr.

Mileage Fee

Employees will be paid twenty-one and one-half ($.215) cents per mile if they are required to use their personal vehicles for College business.

Donald S. McPherson © 1992
Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

OFF ON HOLIDAY?

The City of Midvale and the Uniformed Employees Union are parties to a Working Agreement covering all police officers. Midvale, like many cities, finds itself under enormous fiscal pressure and the Mayor's office has ordered all City Departments to find ways of reducing expenditures. One particular target of this effort is overtime.

On December 19, the City Budget Director advised the Chief of Police that the Bureau of Police must cut its premium pay for the remainder of the year or there would be insufficient funds to meet payroll. On December 20, the Chief of Police determined that the only option available was to staff the upcoming holidays with skeleton crews, thereby paying less in holiday premiums. This staffing strategy was considered to be feasible because, unlike other holidays listed in the Agreement, Christmas, New Year's Day, and Thanksgiving are 'home holidays' on which businesses, courts, and government offices are mostly closed and police service calls are far fewer.

Because of their nature as family celebrations, on Thanksgiving, Christmas and New Year's Day more employees have typically wanted to be off than the Bureau of Police has been willing to allow. The presenting problem was conceived as how to get a sufficient number of Police Officers to work. Zone Commanders would direct shift Lieutenants to seek volunteers to work on the holiday. Lieutenants also would limit the number of Officers who could be off on holiday, permitting employees to be off on the basis of seniority and not permitting employees to have off both Christmas and New Year's, for example.

The Bureau of Police had never previously scheduled off Police Officers for Thanksgiving, Christmas or New Year's. In effect, any Officer who wanted to work on a holiday, assuming he or she was normally scheduled to work and not on a "pass day," could work.

Section 10 of the Agreement concerning holidays has been the subject of recent bargaining. For the previous contract, the City proposed amending Article 10C to read, in pertinent part: "An employee who is not required to work a holiday or is on pass o[n] the holiday shall receive eight hours of pay at the employee's basic hourly pay rate for the holiday." This provision was not accepted by the Union or awarded in interest arbitration. For the current Agreement, the City repeated its unsuccessful Section 10C amendment and again the provision was not accepted by the Union or awarded. The City also proposed, unsuccessfully, the deletion of Section 10B.2 and eliminating the option of time and one-half plus paid compensatory time in Section 10B.1.

Bargaining for a successor to the current Agreement, which expires January 31, is underway. The City has not repeated its earlier proposed amendment to Section 10C but instead has proposed reducing the number of holidays to ten and providing that there shall be "no additional compensation for working on a day designated as a holiday." The City has also proposed replacing the language of Section 10B with the following:

It is understood that the purpose of holidays is to provide police officers with time off on a basis equivalent to the time off provided non-police officers. It is not the purpose of holidays to provide police officers with additional compensation.

The President of the Uniformed Employees Union protested the new schedule as soon as it was posted, charging the Chief with violating both contract language and past practice. However, at the first informal step of the grievance procedure the City indicated that it had no intention of changing its position. The Union President said he hoped the City would reconsider, but would file a grievance on January 2 if the Chief of Police actually followed through with implementation of the posted holiday schedule change. The City implemented the schedule change as posted.

As a result, approximately 220 individual Police Officers were actually scheduled "off" on holiday for Christmas Day and/or New Year's Day, receiving straight time pay for the holiday. Compared with the previous Christmas, 475.5 fewer Police work hours were paid, i.e. approximately 59 fewer eight hour employee-days, for a savings of approximately $7,878. Compared with the previous New Year's, 1,054 fewer Police work hours were paid, i.e. approximately 132 fewer eight hour employee-days, for a savings of approximately $17,537.

PERTINENT PROVISIONS OF THE AGREEMENT

SECTION 3 - SENIORITY

A seniority system based upon continuous service and applicable ability considerations shall be followed for employment security and work assignment determinations, to include annual "Job Pick" selections and awards of and to police service employees, during the term of this Agreement.

* * * * *

D. Annual Bidding (Job Pick) Procedures

By October 1 and continuing until October 31, of each calendar year, the Chief of Police will post "Projected Staffing Level Notices" indicating regular assignments and shifts to be filled by Police Officers at each Police Station. During the posting period all Police Officers at each Station shall be given the opportunity to sign the Pick Sheet with his or her preference of position and shift. All regular position and shift assignment selections shall be made and awarded on a Seniority basis.

SECTION 4 - MANAGEMENT

A. The City and the Director of the Department of Public Safety, through the Chief of Police shall have the exclusive right to manage, administer, and supervise the employees including the right to schedule and assign work . . ..

SECTION 5 - LAWS

A. The parties shall observe and be bound by the Public Law prohibiting strikes by uniformed public employees. During the term of this Agreement there shall be no lockouts. . . .

SECTION 8 - HOURS OF WORK

A. This Section defines the normal hours of work, but shall not be construed either as a guarantee of hours of work and pay or as a basis for calculating overtime hours of work and pay, except as provided for, otherwise, in this Agreement.

* * * * *

2. The normal workweek shall be five (5) workdays beginning on the first day of any seven (7) consecutive day period which may begin on any day of the calendar week. Workdays shall be consecutive except for days off. The normal two (2) days off (pass days) shall be consecutive days off.

3. The normal workweek shall apply except in emergency cases for the suppression of riots or tumults or the preservation of the public peace in times of riot, conflagration, or public celebrations.

SECTION 9 - OVERTIME

B. Overtime rates of one and one-half (1-1/2) times the regular rate will be paid for:

* * * * *

2. All hours worked in excess of forty (40) hours in a workweek.

* * * * *

D. Any paid sick leave day, unworked holiday or vacation day shall be counted in determining weekly overtime in Paragraph B2. above, if the employee would have been scheduled to work but for the holiday, vacation, or paid sick leave day.

SECTION 10 - HOLIDAYS

Each employee shall be entitled to the following holidays:

(1) New Year's Day January 1,
(2) Lincoln's Birthday February 12,
(3) Washington's Birthday February 22,
(4) Good Friday,
(5) Memorial Day,
(6) Flag Day June 14,
(7) Independence Day July 4,
(8) Labor Day,
(9) Columbus Day October 12,
(10) Veteran's Day November 11,
(11) General Election Day,
(12) Thanksgiving Day,
(13) Christmas Day December 25, and
(14) Martin Luther King Day January 15.

A. DUPLICATION

1. A holiday which occurs during the vacation period of an employee shall be charged to the vacation period of the employee and the Holiday shall be deferred.

2. A holiday which occurs while an employee is on authorized sick leave shall not be charged against the sick leave of the employee.

3. An employee who is receiving compensation benefits when a holiday occurs is not entitled to have the holiday at a later date upon return to work or to receive additional pay for that day.

B. HOLIDAYS WORKED

1. Any employee who works on any of the listed holidays shall have the choice of double time and one-half pay for all hours worked on the holiday, or pay at time and one-half for the holiday worked and eight hours compensatory time off with pay at straight time at a later date.

2. An employee shall be paid double time and one-half on holidays unless he or she elects, in writing, to choose equal compensatory time off before the end of the regular shift on the holiday so worked.

C. UNWORKED HOLIDAYS

When a holiday falls on a pass day, an employee shall receive the choice of pay at straight time for the holiday or equal compensatory time off with pay. An employee shall be paid straight time on the holiday unless he or she elects in writing to choose equal compensatory time off before the end of the last shift scheduled and worked prior to the pass day on which the holiday occurs.

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Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

NOTHING PERSONAL....STRICTLY BUSINESS

James Filtcher, a machinist, has been employed by the Excelsior Tube Company for 18 years. At approximately 8:30 p.m. on the afternoon shift last Monday, Supervisor Imagene Foreman observed Filtcher re-entering the machine shop from the parking lot outside #1 packing area, which is about 100 yards away from Filtcher's normal work station on the other side of the shop building.

Finding this behavior suspicious, Foreman walked outside to the parking lot, where she saw Filtcher's pickup truck. Since Filtcher normally parks in the employee parking lot at the front of the plant, Foreman decided to look into the bed of the truck, where she saw six pieces of stainless steel pipe in miscellaneous short lengths, 4-5 pairs of greasy company work gloves, a box of empty aluminum soda cans, and a two foot coil of copper tubing. Foreman returned to her office and informed Plant Manager Hugo Baas by phone. Baas told Foreman he would be coming to the plant and instructed her to notify the Township Police of a suspected theft.

At 9:30 p.m., Foreman observed Filtcher leave his work station during his 15 minute coffee break and walk across the shop to exit to the parking lot outside #1 packing area. When Filtcher returned after his break, Foreman went out to the parking lot and discovered that Filtcher had moved his truck to the employee parking lot.

At 10:50 p.m., Baas and Foreman, accompanied by a Township Police Officer, went to Filtcher's truck, where they observed, in addition to the items Foreman had seen earlier, a 4' x 5' piece of tri-wall furnace plate and a small box of scrap stainless steel banding.

When the shift ended at 11:00 p.m., Filtcher punched out and went to his vehicle. As Filtcher drove slowly through the main gate, Township Police Officer Francis X. Quinn pulled his cruiser in front of the truck. After reading Filtcher his Miranda rights, Quinn asked if he had Company property in his truck. Filtcher readily admitted that there were items of Company property in his truck, but said all except one item was scrap and that item, the furnace plate, he was only taking to have analyzed in order to put in a bid to buy it.

Baas told Filtcher to appear for a disciplinary hearing with his Union steward at the start of his afternoon shift on Tuesday. Quinn told Filtcher to accompany him for further questioning. Filtcher voluntarily wrote a statement. Quinn told Filtcher to expect to receive a summons to a Magistrate's hearing within 2-3 weeks if the Company decided to press charges.

> I admit to the "taking" of several pieces of small diameter pipe, a small quantity of scrap stainless steel banding and one copper condensing coil (approximately 7 lb). I also admit to "taking" a number of empty aluminum soda cans and used, dirty work gloves, all of which had been discarded.

I would like to note that I could have denied any theft and disclaimed any knowledge or responsibility for the items involved.

The night I removed these items, I intended to get a permission slip from my supervisor but she was not around. I naturally assumed she was tied up with other duties. The procedure for removal of such scrap items of little consequence is very informal. I therefore felt there would be no objection.

Empty cans and used gloves are pure garbage. Items like the banding scrap and the small pieces of pipe could have some value, but the Company does not attempt to collect and sell these. Half the employees at the plant -- including managers -- have barbecues or flag poles made from such scrap at their homes.

Concerning the furnace plate, I was removing one small section only to have it analyzed by a dealer the next morning. I was going to return it at the beginning of my shift Tuesday. I have bought scrap from the Company in the past. There were more than a dozen such sections of furnace wall available - I wanted to buy it, not steal it!

I remain adamant that I am <u>not</u> guilty of theft. I am guilty of misguided assumptions, technical violations of minor procedures, and having too much faith in the common decency of supervision.

I have been dealt with unjustly. I have a good record and 18 years service. There was no reason to call the police. My supervisor and I have never gotten along in the three years she's been over me and this was just an opportunity for her to get me and look good to her boss. The Company has no rules against employees running businesses on the side. Other employees also collect thrown away cans, gloves, pieces of pipe, etc. Some of my fellow employees collect for me, for which I pay them by the piece, pound, whatever. This is actually something of a service because the Company doesn't have to pay to have the garbage hauled away. If disciplined for theft by the Company, I will grieve because I've done nothing wrong.

The next afternoon, Filtcher appeared with his Union steward as directed. Baas informed Filtcher that the Company considered his actions to constitute serious theft and could lead to severe discipline including discharge. He asked what Filtcher wished to say about the incident. Filtcher gave Baas a copy of the statement he had made to the police. After a short private meeting with Foreman, Baas told Filtcher that based on the known facts and his own statement, he was being discharged immediately for violation of Group 3 Rule #4 prohibiting theft. Baas also said the Company might press charges.

Filtcher protested that he had done nothing wrong and was being victimized by a personality conflict. He said he would grieve the discharge and left with his Steward.

ADDITIONAL UNDISPUTED FACTS

1. Except for the furnace plate, which was on a skid of similar plates in a storage area, all of the items removed by Filtcher were in or around disposal bins. The Company requires no permission for removal of empty soda cans or used work gloves.

2. The Company's procedure for scrap removal is that the employee must receive a permission slip from the Supervisor. From time to time permission is withheld on larger items and there have been instances where the Company has placed collection bins for scrap. But, in general, the Company does not consistently collect such materials and permission is usually given to remove scrap of little value.

3. The Company would not normally grant permission for removal of copper tubing or furnace plate although it might agree to sell such items. The scrap value of the copper taken by Filtcher is estimated at $ 79. The scrap value of the furnace plate is estimated at $104.

4. Filtcher runs a small scrap business and supervision is aware of it. On one occasion in the past Filtcher requested, bid on, and bought from the Company a quantity of scrap brass.

5. Filtcher and Foreman do not get along and, in general, they try to avoid interacting. It is not unusual for them to argue.

6. Filtcher has a good discipline record and is considered a good machinist. He has been involved only in minor discipline, no more than warnings, and the Company weighed no prior disciplinary actions when it decided to discharge Filtcher for theft.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE III -- MANAGEMENT

Section 1. The Company retains the exclusive right to manage the business and plant and to direct the working force including the right to hire, establish work schedules, make and enforce rules governing the conduct of employees and discipline, suspend, or discharge for cause.

OTHER PROVISIONS (unilateral, non-contractual)

COMPANY WORK RULES [emphasis in original]

The Company retains the right to treat each occurrence upon its individual merit without creating precedents. Examples given in any rule do not limit the generality of the rule. These rules and Regulations are not to be construed as a limitation upon the rights of the Company but constitute a guide.

The Rules provide recommended, standard penalties. A more or less severe penalty may be issued if circumstances warrant. Consideration will be given to the severity of the offense, the cost involved, the time interval between violations, the length and quality of the service record, and the ability of the employee concerned. However, in any case where the penalty deviates from the recommended standard, written justification for such deviation will be given.

* * * * *

GROUP 3

First Offense ---------- Discharge

* * * * *

4. Stealing or similar conduct, including destroying damaging or concealing of any property of the Company or of another employee or visitors.

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Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

A LEAKY FAUCET

A concern with the rising number of delinquent accounts led the Friendly Water Company to institute an employee delinquent account procedure. The Company had experienced an overall increase in the number of delinquent customer accounts, from approximately 89,000 three years ago to over 104,000 last year. Not all Company employees are Friendly customers; about 60% live in Friendly's service area and the remaining 40% live in areas served by other water companies.

Regular, non-employee customers with delinquent accounts receive a series of 4-5 progressively stronger overdue letters. Ultimately, failure to pay results in entry into the Public Utility Commission's regulated service termination procedure. Approximately 4,000 service terminations, the most drastic step available to the Company, occurred in the last calendar year.

Six months ago the Company announced at a regular Company-Union meeting its intent to establish immediately an employee delinquent account procedure. Financial Affairs Vice President Samantha Waterson attended the meeting, provided to the Union the figures above, and termed Friendly's delinquent account problem "a leaky faucet" draining away revenues that are needed for operating in the emerging de-regulated, highly competitive utility industry. Waterson said the Company did not intend to institute a "rule" or even to notify all employees of a new "policy," noting that many Management procedures as well as policies are not communicated to all employees. She did note that any employee who became involved in such a problem would be fully on notice, however, because of multiple counseling sessions preceding discipline and two formal, written warnings preceding any suspension.

According to the procedure, if an employee account were still delinquent -- or were repeatedly delinquent -- after a series of counseling sessions and both warning letters, the Credit and Collection Department would refer the delinquent employee account to Industrial Relations. Industrial Relations would research and confirm all data and then have the Human Resources Manager contact the employee, go over the account, and give the employee the option of paying by cash or by payroll deduction or being subject to further disciplinary action - a suspension.

The Union responded that it did not believe employee-customers should be treated any differently than other customers and objected to a policy that would not affect employees equally. However, since the procedure was within the Company's right to manage, Union President Ramon Agua indicated that the Local would not grieve Management's right to make the policy per se, but would become involved if a case actually reached the discipline process. Agua added that the Union had no problem with any sort of employee counseling, so long as it did not rise to the level of harassment, and that the Union would cooperate in any way requested by the Company to urge employees to pay their Friendly water bills in a proper and timely fashion.

Two months after the procedure was initiated, a bargaining unit employee, Eddie deCreke (who was considered a very shallow person by other employees), received a first warning letter under the employee delinquent account procedure. He showed the letter to Agua but said he did not wish to file a grievance since it was only a first written warning and he didn't want to "make waves." Union President Agua wrote to Seamore Vanderpool, Manager of Industrial Relations, noting that deCreke had chosen not to grieve the discipline but restating the Union's position that the Company must proceed through normal bill collection procedures and that discipline should have no place in the collection procedure.

Vanderpool's responding memo recognized the fact that the Union was objecting. "But this is water under the bridge," he asserted. "The procedure has been properly announced to the Union and has been in effect Company-wide for two months. "We're talking about a management right," Vanderpool concluded, "and the Company is not about to flounder."

About six weeks after the deCreke incident another bargaining unit employee, Walter de la Mare, told Agua that he had been directed to attend a disciplinary meeting with the Human Resources Manager, Victoria Falls, concerning his delinquent employee account. He asked for and was granted permission to have a Union representative present. Agua said he would go personally.

de la Mare, who is something of an amateur poet, owns a small rental property that he had used as a writing and painting studio but for the past 11-12 months had been renting to an in-law who had lost his job and was unable to find work. de la Mare is the customer of record for water service to the property. Over the past nine months he received several delinquency notices from Friendly for this property. Each time he would make some payment on the balance, but he never paid it off and began to be referred through the new procedure to counseling.

Three months ago de la Mare made no payment in response to an overdue letter and he received his first warning letter. The next month he sent a partial payment that was returned for insufficient funds and he received the second warning letter. Ten days after its due date, payment had still not been received on his water bill for this month and he was directed to see Falls. At that point, his delinquency amounted to $420.00.

Agua accompanied de la Mare to Falls's office where Falls advised de la Mare of his options. In light of his payment record and the fact that he had progressed all the way through the delinquent procedure, including all the warning letters, without adjusting his behavior, Falls took the position that discipline was automatic and a suspension was appropriate. Falls told de la Mare that he could either pay the bill and accept a disciplinary suspension of one day or be suspended indefinitely. Agua asked if "indefinitely" meant "until he pays the bill." "No," Falls replied, "indefinitely means indefinitely. First he has to pay the account in full and he is certainly suspended for however long that takes. Once the bill is paid, we'll determine when he will be permitted to return to work."

Agua's resentment overflowed as he watched the anger well up in de la Mare during Falls's description of his options. "You call that discipline for just cause?" Agua screamed at Falls, "you'll have a grievance within the hour." "Yes, we do consider it for just cause" Falls replied calmly, "and grieving is certainly your right. Now, what will the choice be?"

Angrily, de la Mare refused to accept the one day suspension and was suspended indefinitely by Falls. He then offered to pay the bill on the spot by check but Falls refused to accept a personal check and reminded him he would be suspended for the multiple delinquency whether or not he paid immediately. Agua and de la Mare stormed out of the room. Later in the day, de la Mare paid the entire bill -- in pennies. He was then notified by Falls that his suspension would be for three days and given permission to return to work at the conclusion of the suspension.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE II "Union-Company Relationship"

A.1. The Management of the Company and the direction of the working forces, including the right to hire, suspend, discharge for proper cause, promote, demote, transfer, relieve employees from duty because of lack of work or for other proper and legitimate reasons, are recognized to be in the Company, except as otherwise provided in this Agreement.

* * * * *

A.3. The Union and the Company agree to continue their policies of not discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment or otherwise affecting his status as an employee because of his race, color, religion, sex, age, national origin, handicap, or because he was a disabled veteran or Vietnam era veteran. The Union and the Company further agree to apply all practices and terms of the Collective Bargaining Agreement uniformly to all covered employees.

ARTICLE IX "Grievances - Arbitration"

H. Should an employee be suspended or discharged he shall be entitled to a hearing, starting with the fourth step, and the case shall be disposed of promptly. If it is determined at the fourth step or in arbitration that the suspension or discharge is in violation of the terms of this Agreement, the employee shall be restored to his former position and status without loss of pay. However, if it is determined at arbitration that discipline was for just cause, the Arbitrator shall have no authority to modify's the Company's disciplinary penalty. Neither shall the arbitrator have authority to add to, subtract from, or in any way alter the provisions of this Agreement.

Donald S. McPherson © 1993
Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

SICK AS A DOG

Rex Lear has been employed by the City of Gloucester as a social work counselor for the past fifteen years. Lear is blind and relies on his dog, Fool, for his independent mobility. His primary responsibility is to counsel in the office or by telephone, elderly and economically disadvantaged citizens and to assist them with making contacts with city, state and federal agencies providing services they may need. He works a regular Monday-Friday office schedule.

About six months ago, Lear asked his supervisor, Ruth Goneril, for advanced permission to use three days of sick leave. Goneril gave permission on condition that Lear provide a certification of the condition leading to the need for leave upon his return to work.

Lear was absent for the three days, as arranged in advance and scheduled, and upon reporting back to work presented Goneril with certification from Samuel Bacon, V.M.D., that Lear's dog, Fool, had undergone major, non-elective veterinary surgery and was confined to the Globe Veterinary Hospital in nearby Heath for three days.

Goneril was angered and, after checking with the Director of Employee Relations, Sarah Regan, wrote Lear a letter of warning stating that Lear was officially admonished that sick leave was not available to cover the illness of animals and warning him that any future repetition of such use would result in severe discipline. Lear was angry and hurt. He wrote a letter to Goneril, copied to Regan:

> I am extremely hurt and disappointed at the insensitivity of the City toward my physical condition with your recent imposition of discipline, particularly in view of my long and loyal service. Your thanklessness cuts me more sharply than a snake bite. It is especially ironic that the City would take this action toward someone with my job responsibilities.
>
> While I am choosing not to formally grieve this warning letter, please know that I vigorously disagree with your action, protest it, do not accept it as discipline, and will grieve any further disciplinary action in the future in such circumstances. I recommend strongly that you review the City's policy on sick leave with respect to unsighted persons and request that you retain this letter in my personnel file as evidence that I do not agree with this imposition of discipline.

Last Wednesday, Fool was attacked and bitten by another dog while Lear was walking home from work. The dog again had to be treated at the Globe Veterinary Hospital and was required to stay over three nights, Wednesday, Thursday, and Friday. Lear called in sick Thursday morning, saying he expected to be able to return to work on Monday.

One of Goneril's fellow supervisors, Edgar Cordelia, saw Lear walking home with Fool, whose right hind leg was splinted, after the dog's discharge from the veterinary hospital on Saturday afternoon. Cordelia told Goneril, who consulted Regan. When Lear reported to work Monday morning, Goneril asked him for documentation for his sick leave.

Lear reminded Goneril that he had only used two days, not three. Goneril then told him that management was entitled to require documentation when sick leave abuse was suspected and that her request was simply a follow up on the warning Lear had been given concerning "the dog incident." Lear said he'd bring the documentation Tuesday morning.

When Lear appeared Tuesday morning with another veterinarian's certificate from Samuel Bacon, Goneril told him to report to Regan's office, with a Union steward if he wished, in 30 minutes. Lear appeared with his steward. At the meeting, Regan told Lear he was being charged with insubordination for failing to follow directives not to use sick leave for illness of animals, and for providing false information by requesting sick leave which is only to be used, by contract, for personal or family illness - "of human beings." Regan said Lear was suspended for two weeks. This made Lear mad. After consulting briefly with his steward, he said he fully intended to make a howl over it and would grieve the suspension.

ADDITIONAL UNDISPUTED FACTS

1. Employees have been permitted to utilize sick leave to keep appointments with such health-related providers as podiatrists, chiropractors, physical therapists, vision care providers, speech and hearing therapists, psychologists, and dentists.

2. Employees have been permitted to utilize sick leave to keep appointments to obtain, repair or maintain a variety of prosthetic devices.

3. Lear is completely dependent upon his leader dog for mobility on the job.

4. The Employer's unilateral rules and regulations include "Insubordination" and "Providing False Information or Falsifying Records" as major offenses.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE II NON-DISCRIMINATION

Section A. Neither the employer or its agents, nor the union or its agents, nor any other employee shall commit any act of employment discrimination prohibited by state or federal law against any employee.

Section B. If any provision of this Agreement is in conflict with applicable federal executive orders or any state or federal laws concerning employment discrimination, the provisions of such orders or laws shall prevail.

ARTICLE V DISCIPLINE AND DISCHARGE

Section A. No employee shall be disciplined or discharged except for just cause. Progressive discipline shall be used except for major offenses, for which suspension or discharge may be imposed on a first offense.

Section B. In the event a grievance protesting discipline or discharge reaches arbitration, if the arbitrator concludes that the employer had just cause for the discipline, the arbitrator shall have no jurisdiction or authority to modify the degree of discipline imposed by the employer.

ARTICLE IX LEAVES OF ABSENCE

Section A. Sick Leave

1. Per calendar year, employees are entitled to twelve (12) days of sick leave paid at the employee's regular daily wage rate to be used for any absence related to the employee's own personal illness or accident which occurs while the employee is in active pay status.

2. Sick leave shall be cumulative from year to year, to a maximum of 200 days.

3. The provisions of this Article shall not preclude the employer, at its sole discretion, from granting additional sick leave for good cause provided, however, that the employer may not discriminate in the granting of such additional sick leave or violate any applicable laws.

4. A physician's certificate may be required, at the employer's discretion, for absences of three (3) or more consecutive days or whenever, in the opinion of an appropriate representative of the employer, sick leave is being abused.

5. An employee may use up to four (4) days of sick leave for the death of a spouse, parent, step-parent, child, step-child and up to three (3) days of such leave for the death of a brother, sister, grandparent, grandchild, son or daughter-in-law, brother or sister-in-law, parent-in-law, grandparent-in-law, aunt, uncle, or any relative regularly residing in the employee's household or any person with whom the employee has made his or her home.

6. When it is impossible to schedule personal medical appointments during non-work times, an employee may utilize sick leave with the approval of the employer. An employee who is absent for a partial day will be charged one-half (1/2) day of sick leave.

7. With the approval and at the sole discretion of the employer and subject to operational needs, an employee may use up to three days of sick leave when sickness in the immediate family requires the employee's absence from work. At its discretion, the employer may require proof of such illness in a form satisfactory to the employer, providing that such requirement of proof may not violate any person's rights to confidentiality of medical records.

8. With advanced notice and approval and subject to operational needs, an employee may use a maximum one day of sick leave each six months as a "personal day." Personal days may be used for any reason and no documentation shall be required by the employer for their use.

* * * * *

Section H. Unpaid Leave of Absence

On application to the immediate supervisor stating the reason and anticipated duration of leave, employees may be granted leaves without pay at the sole discretion of the employer for any reason for any period, not to exceed two years, which may be extended, at the sole discretion of the employer, for one additional year.

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Professor of Industrial & Labor Relations
Indiana University of Pennsylvania

THIRTY YEARS TO LIFE

The Leavenworth School District and Leavenworth Education Association have in force a four year collective bargaining agreement which is currently in the third year of its term. In March, teachers Jean Brodie and John Chips, each 52 years old and each completing 30 years of service, indicated to the Business Manager, Allen Wood, that they intended to retire. Wood was surprised; he thought the School Board was unprepared to say goodbye to Mr. Chips and everyone knew that Miss Jean Brody was still in her prime.

Brodie and Chips were the first teachers to seek retirement at the end of the current school year. Under the current contract, the District agreed as an early retirment incentive to continue to provide hospitalization and major medical benefits at District expense to teachers upon retirement until they reached 65 years of age. In the first two years of the Agreement, 10 teachers retired early, largely due to that incentive. Last fall the state legislature enacted a law providing a bonus in the pension calculation formula for teachers with at least 30 years service who retire this year and next year. So Pleasantville anticipates that Brodie and Chips are the first of many likely retirements.

Brodie and Chips both told Wood that they wished to continue their life insurance at their own expense. The Business Manager told them that to do so they would simply exercise the conversion option and provided them with the appropriate forms. They asked what the premium rate would be. Wood phoned the insurance company and then told Brodie and Chips that for a 52 year old retiree, the premium for an individual whole life policy providing a $40,000 benefit would cost $138.44 per month.

The teachers were shocked and Brodie asked if that's what the District was paying for every teacher. The Business Manager responded that since active employees were covered by a group term policy, rather than individual life insurance, the premium paid per teacher by the District for the $40,000 coverage was $6.55 per month. He further explained that the insurance on employees was term and not permanent insurance, whereas the conversion privilege that was part of the group policy provided retirees with permanent insurance carrying a cash value as well as the right to borrow against the policy.

Brodie and Chips had been under the impression that they would merely pay whatever premium the District had been paying and consulted the Local Association President, Dan Bury, who expressed surprise at their story and agreed with their expectation. He went to see the Superintendent, Dr. Anne Warden, asking confirmation that the Superintendent believed the Business Manager was correct. Upon receiving confirmation, the Association president explained that the union vigorously disagreed with the District's interpretation.

Dr. Warden responded by stating that the school district's life insurance plan included a conversion for employees who retire and employees wishing to continue the life insurance simply have to elect this conversion mechanism. She further stated that this had been the District's practice for many years, over at least three collective bargaining agreements, and that the District had labored hard to secure the policy. She pointed out that disagreement with the practice to date was confined to this solitary instance.

On Bury's advice, Brodie and Chips wrote the Superintendent a letter saying that they wished to continue as members of the District's group life insurance plan and asking for the necessary forms. Dr. Warden responded with a letter explaining the District's position and enclosing copies of the same conversion application form and policy that the Business Manager had given Brodie and Chips earlier.

The Association President then filed a group grievance on behalf of Brodie and Chips and all other teachers who might retire after the date of the grievance under the terms of the collective bargaining agreement.

ADDITIONAL UNDISPUTED FACTS

1. Prior to the events giving rise to the grievance, prospective retirees had inquired about continuing life insurance but no employee had ever requested to continue in the District's group life insurance plan and pay the premiums after retirement.

2. The District obtained the current Group Life Insurance policy following negotiations eight years ago and the policy has remained in effect unchanged from that date to the present. The language of Article XII,F, which was newly bargained eight years ago, has also remained unchanged through the past agreement and the current Agreement.

3. The Agreement immediately prior to the current Agreement was for two years. The Agreement prior to that agreement was for four years.

4. When the group life policy was initially purchased eight years ago, the Business Office provided each employee with a booklet explaining policy. Each booklet contained an insert stating: "The amount of life and accidental death & dismemberment/loss of sight benefits will terminate at retirement. You have the right to continue the current amount of your insurance coverage uninterrupted and without medical examination upon retirement by exercizing the conversion privilige contained in this group insurance plan and paying the premiums." The Business Office has provided each new employee hired since that time with a booklet.

5. The District's group life insurance policy covers not only teachers but also covers all other District employees -- secretaries, cafeteria workers, teachers aides, bus drivers, and administrators. The actual amount of term insurance per employee varies by bargaining unit or Board policy. But the conversion mechanism is uniform in the policy for all employees who retire from the District.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE III - MANAGEMENT RIGHTS

Except as expressly limited in this Agreement, the Employer has the sole and exclusive right to manage all aspects of the enterprise, including but not limited to control all facilities, determine quantity and quality standards of service, determine the budget, and select and direct the work force, and discipline for just cause.

ARTICLE XII - INSURANCE

Section A. Life Insurance - The Employer will pay group life insurance premiums to provide $40,000 worth of life insurance coverage for each employee.

* * * * *

Section F. Retirees - Retirees may continue to participate in the Employer's group plans at their own expense until the age of sixty-five (65) if they so desire. Payments will be made on a quarterly basis, the retirees being required to pay one quarter in advance. Failure to meet quarterly due date payments will result in the discontinuation of the ability to participate in the Employer's group plan coverage at 12:01 a.m. on the day after the payment is due. Coverage will be terminated at the end of the prepaid quarter. Arrangements for such payment shall be made between the retiree and the Business Office.

ARTICLE XXVI - WAIVERS

The parties agree that all negotiable items have been discussed during the negotiations leading to this agreement, and that no additional negotiations will be considered on any item, whether contained herein or not, during the life of this agreement.

OTHER PERTINENT PROVISIONS

EXCERPT FROM GROUP MASTER LIFE INSURANCE POLICY

Conversion Privileges Upon Termination of Employment

The term life insurance provided to employees terminates with the termination of your employment. You have the right to convert your group life insurance to an individual policy of life insurance without the need for medical re-examination. If you wish to exercise this option, you may purchase an individual life insurance policy in any form then issued by us except a policy of term insurance. An application for conversion will be found at the back of this booklet. Filing of the application, together with premium payment for the initial six month period, will guarantee that the amount of insurance you have under the term plan will stay in force uninterrupted during the conversion to an individual policy.

Donald S. McPherson © 1993
University Professor of Industrial Relations
Indiana University of Pennsylvania

A REAL PRO

Amy Freund began her employment on January 15, 1992, as the new and first full-time, professional Human Resources Director of Friendly Manor, a large eldercare facility providing skilled nursing care, intermediate personal care, and day care. Over the past 12 years, Friendly has had five permanent and three acting Administrators and Employee Relations activities and record-keeping have been erratic. Freund's major task is to bring stability to these various functions. She was introduced to the employees by the Administrator as "a real pro" and is fond of reminding others, including the Union's representatives, that they're dealing with a professional now.

Because an unusually large number of employees were on various forms of long term unpaid leaves, Freund soon discovered that employees on extended leaves were not consistently having their vacation entitlements pro-rated to account for the time they were off work. In 1992 to date, 16 employees had been off work over 6 weeks, including 8 workers' compensation leaves, 6 medical leaves, and 2 maternity leaves. None of these had yet asked for vacation in 1992.

Checking past records, Freund discovered massive inconsistency; apparently vacations had been pro-rated according to whether the incumbent Administrator thought about it. Correspondence files contained a few memoranda from the Administrators to complaining employees explaining that it wasn't reasonable for a person to earn vacation entitlement when not working. After reviewing the existing records, interviewing senior supervisors, examining the Agreement and securing approval of the Administrator, Freund posted a "Memorandum of Policy: Vacation Entitlement/Proration" on February 15, 1992, stating:

> Effective March 1, 1992, employees on long-term leave, who are not earning vacation, will have their vacation entitlement for the current year pro-rated according to the percentage of time they have been off work. Such employees have not worked as full time equivalents for the purpose of computing vacation. Consistent with long-standing past practice, pro-rating will occur whenever such leave extends beyond six weeks.
>
> All employees entitled to vacation benefits in 1992 who are on extended leaves should check with the Human Resources office to learn of their revised vacation eligibility before requesting vacation. This Policy is established in order to bring consistency to the treatment of employees on long term leaves with respect to vacation eligibility.

Freund sent a copy of the posted Policy to all employees currently on extended leave as well as to the Local Union President.

Responding to complaints from three of the employees currently on extented leave, the Union filed a group grievance on March 1, 1992, the effective date of the new Policy.

ADDITIONAL UNDISPUTED FACTS

1. There is no relationship between the type of leave and whether vacation was pro-rated. In 1991, 12 employees were off over 6 weeks. Nine (75%) had vacations pro-rated. In 1990, 10 employees were off over 6 weeks, including 5 workers' compensation leaves, 2 medical leaves, 2 maternity leaves, and 1 personal leave. Six (60%) had vacations pro-rated. In 1989, 4 employees were off over 6 weeks, all workers' compensation leaves. Two (50%) had their vacations pro-rated. In 1988, eight employees were off over 6 weeks, including 3 workers' compensation leaves, 3 medical leaves, and 2 personal leaves. Two (25%) had their vacations pro-rated.

2. There is no reliable evidence of the frequency of pro-rating prior to 1988. From the records that do exist, pro-rating before 1988 was even more inconsistent than in recent years.

3. Whenever pro-rating has occurred in the past, it has only been done for extended leaves longer than six weeks.

4. In the bargaining which resulted in the current (1992-95) and two most recent prior Agreements (1989-91; 1986-88), neither party made any proposal regarding pro-rating of vacations nor has there ever been any discussion of that topic during negotiations.

5. The parties did negotiate various changes concerning vacations and sick leave, and concerning other sections that bear on those subjects, in bargaining for the current and two prior Agreements.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE IV - MANAGEMENT RIGHTS

Section 1. The Employer retains the exclusive right to manage, to determine all questions concerning its facilities, and to direct the working forces, limited only by the express provision of this Agreement.

ARTICLE IX - VACATIONS

Section 1. Eligibility and Allowance. Except as restricted herein, employees shall be eligible for paid vacation after one (1) year's service with the Employer. Employees shall start to earn vacation allowance as of their date of hire. Vacation entitlement shall be by seniority based on the following schedule for full-time equivalents. Part-time employees hired prior to July 15, 1985, shall earn vacation entitlement on a pro-rated basis. Part-time employees hired after July 15, 1985, and present part-time employees who refuse any offer of a full-time position in their classification, are not be entitled to vacation benefits.

After 1 year	-	5 work days
After 2 years	-	10 work days
After 10 years	-	15 work days
After 20 years	-	20 work days

Section 2. Vacation Rights in Case of Layoff or Separation. Any employee who is laid off, discharged or for any reason separated from service shall be compensated for unused vacation.

Section 3. Employees shall be permitted to anticipate vacation prior to the anniversary. If an employee terminates prior to the anniversary date, however, restitution for any anticipated but unearned vacation shall be withheld from the employee's final pay.

ARTICLE X - SICK LEAVE

Section 1. Sick leave shall be earned by an employee from the date of employment with the employer for any month in which the employee is in compensable status for ten (10) or more work days. Annual sick leave shall be earned at the rate of 5/12 day per month, non-cumulative, and will be rounded to nearest fraction thereof for computation.

Section 2. Paid sick leave shall be applicable only if the employee is ill on days during which s/he is normally scheduled to work. Employees are permitted to utilize sick leave without pay in those situations where sick leave usage is permitted.

Section 3. The Employer shall provide a Sick and Accident Plan which pays sixty (60%) percent of the employee's gross wage after the fifth (5th) sick day of illness or first day of an accident or hospitalization for twenty-six (26) weeks.

ARTICLE XI - UNPAID LEAVES OF ABSENCE

Section 1. Union Activity or Civic Duty. Any member elected or assigned to permanent office in the Local Union, or as a delegate to any Union activity, or to work as a full-time representative of the International Union, or civic or political office and requiring leave of absence shall be granted leave for a period equal to the length of the term of office or mission, not to exceed four years. Seniority shall not accumulate, unless leave is fifteen (15) days or less per year.

* * * * *

Section 4. Sick Leave. Employees may be granted an extended leave of absence without pay for reason of illness or disability or maternity for a period of at least two consecutive weeks but not more than six consecutive months, with benefits paid by the Employer for the first six (6) weeks and with employee having the option to pay for continued benefits after the six (6) week period.

Section 5. Personal Leave. When family circumstances, such as illness in immediate family, or spouse's job take employee away for a period of time up to six (6) months, employees may be granted leave but shall not accrue benefits or seniority. Employer agrees to continue insurance if employee reimburses cost to the Employer.

ARTICLE XIV - SENIORITY

Section 1. Seniority means length of continuous service since his last date of hire. An employee's continuous service shall be broken by voluntary resignation, discharge for just cause, layoff in excess of one (1) year and retirement. Except as otherwise provided, there shall be no deduction from continuous service for time lost that does not constitute a break in continuous service.

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FLU THE COOP

Rara Avis, a four year employee of Cooperative Package Service, worked at the Drake Distribution Center. The Drake Coop is a huge facility of approximately 400 x 100 yards with miles of conveyor equipment for unloading, sorting, and trans-shipping packages. CPS employs over 450 hourly employees at Drake, all part-time.

On Friday, September 10, Avis was assigned as a "Pick-Off Person" (POP) on the Midnight Sort (11:30 p.m. - 2:30 a.m.). POPs scan packages as they leave trucks on conveyor belts descending into a central "hub," and lift the packages onto the proper out-going conveyor belt so that they are directed to the proper van for regional delivery or truck for the next stage in shipment. Avis reported on time and worked between one and one and one-half hours, until her scheduled break.

Following the break she did not report to her POP assignment but instead "punched out" and left work. Since all Drake employees are part-time, record-keeping is complex and important. "Punching in or out" involves running a badge through a computer terminal swipe slot, rather than punching a time clock. The time/pay records are thus on-line for ease of processing, but no printed record of a punch in or punch out is immediately available. Such records must be verified on screen and printed at a later, separate stage.

When packages started falling off conveyor belts into Avis's POP hub, backing up the operation, Supervisor Earl Nightingale discovered her work area unattended and immediately called Robin Hawk, the Midnight Sort Manager, who directs the entire flow from a catbird seat high above the sorting floor. Hawk quickly reassigned employees from other areas. Nightingale and Hawk then undertook a search of restrooms, the locker room, cafeteria and parking lots, an unsuccessful effort requiring approximately one hour. Nightingale then called Avis's home and, reaching her husband, learned that she had returned home about 30 minutes previously and gone to bed. She was not scheduled to work again until the Monday night sort. Nightingale left a message that Avis should report with her Union steward to his office on Monday night immediately after punching in.

At the meeting, Hawk told Avis that its purpose was to serve as an investigatory interview and that she might be disciplined for leaving her job the previous Friday. He then asked her to explain her actions. Avis said she had been suffering from flu symptoms beginning Thursday and was feeling "queasy" when she reported for work. During her break, she ate a cheeseburger from a vending machine in the cafeteria to get food on her stomach but that made her feel worse and she went to the rest room and vomited. She went back to the vicinity of her work area and told a fellow employee, "Red" Linnet, that she was sick and going home. She said that she'd try to find a supervisor and asked Linnet to tell any bosses he saw that she'd gotten sick and gone home. Avis said she passed her supervisor's office and Nightingale wasn't there. Seeing no other bosses, she punched out and left, vomiting again in the parking lot. Linnet saw no supervisors, so told no one.

Hawk and Nightingale then met privately for about 15 minutes, after which Hawk presented Avis with a letter of discharge effective immediately:

> Discussed at this meeting was your neglect on Friday, September 10, to report back to your assigned work area following break. When asked why you did not report back to your assigned work area you replied "I was sick so I punched out." When asked if you notified your supervisor of your actions you replied "I tried to." Because of your irresponsible actions, which we deem to be job abandonment, and in consideration of your total employment record, CPS is terminating you from our employ effective immediately. This is an official letter of discharge as outlined in Article 49 of our current labor agreement.

Avis was considered a good employee when at work and had been commended by the Employer for her work and received a picture and write-up in the Employer's in-house newsletter last year for having submitted five accepted productivity improvement ideas in the previous 18 months, resulting in an estimated cost savings of over $18,000 annually. On the other hand, Avis had a less than exemplary disciplinary record. Over the course of the four years of her employment, she was involved in numerous instances of discipline and received multiple warnings that future misconduct could lead to her discharge. Avis said she would grieve the discharge and, with her steward's assistance, filed a grievance immediately.

ADDITIONAL UNDISPUTED FACTS

1. Last April, Avis was discharged for "inappropriate behavior" when she "mooned" the other employees in her HUB area during a lull but CPS reduced the discharge to a written warning following settlement discussions with the union.

2. In the current calendar year, Avis was given a written warning on January 15 that any future failure to follow correct call on/call off procedures would be subject to further disciplinary action up to and including discharge. On January 31, she was given a written warning that future failure to correct attendance problems would lead to further disciplinary action up to and including discharge. She had missed a total of 15 days in the preceding nine months, including eight Friday absences. On May 21, Avis was suspended for one day for being absent seven times in the previous three months and warned that further disregard of attendance responsibilities would result in her discharge.

3. In late June, Avis requested an unpaid leave, which the employer granted, voluntarily to enter a 30 day residential drug abuse treatment program. She completed the program and has continued in prescribed after-care group counseling. Prior to the September 10 incident, she had missed one day, calling in sick using proper procedures, since returning to work August 9.

4. There is currently no evidence of any service failure (missing or misdirected package) occurring as the result of Avis's leaving work without notice on September 10.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE 16. LEAVE OF ABSENCE

* * * * *

Section 5. An employee shall be permitted to take a leave of absence for the purpose of undergoing treatment of an approved program for alcoholism or drug abuse. The leave of absence must be requested prior to the commission of any act subject to disciplinary action. Such leave of absence shall be granted on a one-time basis and shall be for a maximum of sixty (60) days, unless extended by mutual agreement or the medical review officer determines additional time is required for treatment. While on such leave, the employee shall not receive any of the benefits provided by this Agreement, Supplements, Riders and/or Addenda, except the continued accrual of seniority, nor does this provision amend or alter the disciplinary provisions of the Agreement or the Employer's right to discipline for proper cause.

- does not reset any clock.

ARTICLE 49 - DISCHARGE OR SUSPENSION

Section 1. The employer shall not discharge nor suspend any employee without proper cause.

Section 2. The employer shall give at least one (1) warning notice of liability to discharge to the employee personally, except that no warning notice need be given to an employee before discharge if the cause of such discharge is dishonesty, drinking alcoholic beverages during the work day (including meal period), addiction, use or possession of illegal drugs or narcotics, recklessness or wanton disregard of job responsibilities while on duty.

↓ absenteeism as major offense

Section 3. The warning notice herein provided shall not remain in effect for a period of more than twelve (12) months.

Section 4. During the grievance procedure following a suspension or discharge, should an investigation prove that the discharge or suspension was without proper cause, the employee shall be reinstated and made whole.

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University Professor of Industrial Relations
Indiana University of Pennsylvania

TRU BLUE

Fidelity Oil and Gas manufactures and retails industrial cylinder gases in a five state area and, because of deteriorating business conditions, filed for Chapter 11 Bankruptcy at the end of June. Fidelity's prospects for returning to a sound financial footing were substantially improved in late July when it successfully completed six months of difficult negotiations and executed a new three year contract to supply bulk hydrogen to the American Power Service Corp. Except for several gaps of one or two years, APSC and Fidelity have had at least some business relationship for the last 20 years.

Because of the volatility of prices and conditions in the industry, APSC insisted on and eventually secured a provision in the contract that either party be able to give 30 days notice of cancellation at intervals of 60 days, six months, one year, and two years from the date of initial agreement. Feeling secure, APSC did not re-investigate Fidelity's financial condition prior to executing the contract and Fidelity did not reveal that it had filed under Chapter 11 the month before.

Fidelity considered securing and maintaining the APSC contract crucial to its ability to remain viable in and, with luck, emerge from Chapter 11 bankruptcy. The Company has had some difficulties meeting payrolls and has had to hold Friday checks until the next Monday on two occasions. In addition, it has been late occasionally with premium payments to the medical and hospitalization insurance carrier, leading to sporadic difficulties and some delays for employees in collecting on claims, though all have been ultimately paid. A relatively small, family-owned enterprise, Fidelity terminated almost all of its managers last year and family members in executive positions assumed virtually all of the operational management responsibilities.

Gertrude Blue has been a bulk driver for Fidelity for nine years and often delivered hydrogen and other Fidelity gasses and lubricants to APSC plants. On September 9, she made a delivery to the APSC plant in Marionville. While her truck was being unloaded, she exchanged small talk with Stan Veritas, the storeroom manager, whom she has known from making deliveries every two or three months over the past six years.

In the course of the conversation, Veritas expressed distress that APSC was considering making employees pay for all of their medical benefits beginning in January. Blue responded, "Well, we supposedly still have our benefits, but the Company often fails to make premium payments so we never know whether our claims will be paid or not. I've heard on the rumor mill that some of the guys have had claims of thousands of dollars held up for more than a year." "Things are bad all over," Veritas replied. "I guess we should just thank God we still have jobs and still get a check every payday." "You're not kidding," Blue said. "And we don't get our checks every pay day; they're often late. I just <u>hope</u> we continue to have jobs. Every morning you read in the paper that some company has gone under. I hope I don't open the paper some morning and see an obituary for Fidelity!"

Later that shift in the vending room, Veritas mentioned to the plant manager, Jim Ash, that he heard from a Fidelity driver that Fidelity must be in pretty bad shape. Ash asked for the details and, upon hearing them, commented that it sounded to him as though Fidelity could even be in Chapter 11. When Ash returned to his office, he phoned APSC's Procurement Manager, Martin Hawker, at corporate headquarters to pass on what he had learned and advise that APSC had better look for a back-up supplier just in case.

Hawker had been responsible for negotiating the three year supply contract with Fidelity's Vice President, Faith Hope, and was both surprised and angered by what he heard. He immediately called Hope, telling her that Marionville plant personnel had just heard from a Fidelity driver "that Fidelity was in such bad shape it might be going belly-up. Is there any truth to that?" Hawker asked. "No," Hope replied, "business conditions are not good but, thanks in part to our good relationship, we continue to operate and meet all our commitments."

"That's interesting wording," Hawker responded, "are you in Chapter 11?" When Hope confirmed that Fidelity was in Chapter 11, Hawker asked why he hadn't been told during the negotiations. Hope responded that he had never asked and, in any case, Fidelity continued to be absolutely reliable in upholding its end of the contract. "Well, I don't like this at all," Hawker responded, "you've made me look incompetent. We're coming up on 60 days. I'll call you in a week or two to let you know if we want to exercise our option to cancel. Even if we don't, we may want to renegotiate -- you better start thinking about what you might do to keep our business."

Hope immediately checked the records to see who had made the Marionville delivery. Blue was due back in to the terminal that evening and Hope called the union steward and asked him to meet her at the loading dock at the end of the shift. When Blue pulled in, Hope was waiting on the dock with the steward. "What's up?" she asked. "Did you tell someone at the Marionville plant that Fidelity is in Chapter 11?" Hope demanded. Blue categorically denied giving such information and recounted in faithful detail the conversation she had with Veritas.

Hope flew into a rage. "Have you no sense or Company loyalty, you idiot?" she screamed. "You've made false statements based on rumors and you know you're not allowed to reveal any inside information to competitors or customers. Now they might cancel the new contract and you may just have cost us all our jobs! One thing's for sure, you've cost yourself yours. Clear out your locker. Get your pay and vacation from the cashier tomorrow. You're fired." The steward appealed to Hope to calm down and think the matter over at least until morning, but Hope refused. "We'll have to grieve," the Steward warned. "See you in in the Supreme Court," Hope replied as she stalked off, "I hope we survive this -- but no matter what, that idiot will never drive for us again."

ADDITIONAL UNDISPUTED FACTS

1. In an effort to keep the contract, Hope flew to APSC's headquarters the next day with two accountants, a lawyer, and all of the Company's key financial records. She completely opened Fidelity's books to Hawker, apologized profusely for not being more forthcoming in the negotiations, and begged Hawker to continue the contract. Hawker made Hope sweat, waiting two weeks to get back in touch. But when he did, he agreed not to invoke cancellation notice at 60 days. He said APSC accepted Fidelity's explanation and would simply take a good-faith, business-oriented look at the matter at each opening date, just as it had intended to do from the beginning, nothing more, nothing less.

2. Blue has a virtually unblemished record with Fidelity. Her only discipline has been an oral warning for tardiness in the first year of her employment and a written warning three years ago for failure to complete accurately Department of Transportation trip logs.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE XI - DISCHARGE AND SUSPENSION

11.1 The employer shall not discharge nor suspend any employee without just cause. The Employer shall not discharge any employee without notice except if the cause of the discharge is dishonesty, drunkenness or recklessness resulting in a serious accident while on duty. Drug or alcohol use on the job, dishonesty, and careless or dangerous handling practices of hazardous materials and compressed gases as directed by Department of Transportation regulations, Compressed Gas Association, or State Department of Health, shall be considered cause for discharge.

EXCERPT FROM EMPLOYEE HANDBOOK

LOYALTY AND CONFIDENTIALITY

In addition to complying in good faith with its rules and regulations, Fidelity expects employee loyalty with respect to its business interests. This means that employees should always act with the Company's best interest in mind and should not engage in any actions which might damage or undermine our business interests. In addition, employees are reminded that all information concerning the Company and its business practices is to be kept in strict confidence and is not to be revealed to any competitor or customer.

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University Professor of Industrial Relations
Indiana University of Pennsylvania

OVERTIME RATES

The Employer, an advertising company, got word that it had won a major new contract for the production of a package of daily full page ads to run in five major national newspapers. The Company had done mock-ups for each of the ads, but the client wanted some creative changes and much work remained to be done in a very short time. In order to get an early start on the work, the Company called all production employees to work on what would normally be their "second" days off, thus scheduling a six day work week. None was called to work on his or her "first" day off. In fact, there had never been a previous occasion when an employee was asked to work overtime only on his or her "second" day off, i.e., on all past occasions employees who were asked to work on a "second" day off had also been asked to work on the "first" day off.

When they received their paychecks and discovered they had been paid only time and one-half for the overtime work on their "second" days off, the production employees grieved.

The Agreement provides, in pertinent part:

> **The work week shall consist of five consecutive 8 hour days followed by two days off. Overtime at the rate of time and one-half (1.5x) the straight time rate shall be paid for all work over eight hours in a work day or 40 hours in a work week. Work performed by employees on the first scheduled day off in the work week shall be deemed overtime and paid for at the premium rate of time and one-half (1.5x) their straight time rates of pay. Work performed by employees on the second scheduled day off in the work week shall be deemed overtime and paid for at the premium rate of twice (2x) their straight time rates of pay.**

Scenario #1:

The various production employees called to work on their "second" days off have differing work schedules, i.e., they don't all work the same five consecutive days.

Scenario #2

The various production employees called to work on their "second" days off have differing work schedule, i.e., they don't all work the same five consecutive days or have the same two consecutive days off. The Agreement provides further that any work performed on Sunday shall be compensated at twice (2x) the applicable straight time rate. Some do have Sundays off.

Scenario #3

The Agreement provides that the work week for all production employees shall be Monday-Friday with Saturday and Sunday off. All production employees called to work on their "second" days off had Saturday off and were called to work on Sunday. The only provisions relating to overtime are those outlined in case facts above, i.e., 1.5 times for all work over 8 hours in a work day or 40 in a work week; 1.5 times for work on the first day off; 2.0 times for work on the second day off. There is no reference to a premium rate for work on Sunday (or any other named day).

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University Professor of Industrial Relations
Indiana University of Pennsylvania

A ROSE BY ANY OTHER NAME . . .

Paul Shroud has worked for the Pleasantville Water Authority for 14 years as a Utility Worker. He is a regular, permanent employee working a scheduled steady day shift Monday through Friday. Shroud has been married for 16 years and undertook the responsibilities of father in the raising and supporting of his wife's two sons and two daughters, his step-children. About six months ago on a Thursday, while at work, he learned by telephone message of the suicide of one of his step sons, Andrew, on the west coast. He requested and received paid funeral leave for death of a child for the remaining 3.5 hours of that day and for Friday and Monday, the day of burial.

His supervisor, who took the call, presumed from the message that Shroud's son had died and had no reason to distinguish between son and step son for purposes of granting the leave. About one week later, the supervisor noticed in the obituary in the local paper that the deceased had a different last name and actually was Shroud's step son and so informed the General Manager. Out of compassion for Shroud, the General Manager determined at her own initiative simply to consider the leave an "administrative error" and a closed matter. She informed neither the Shroud nor the Union of any management doubt about his entitlement to the leave and made no written record of the error.

Last Wednesday at about 2 a.m. Shroud's step daughter, Rose, was killed in a violent local automobile accident. When he called prior to the beginning of his shift on Wednesday to report off and request funeral leave, his supervisor expressed condolences and apologized for having to inquire if the deceased were Shroud's daughter or step daughter. When Shroud responded step daughter, his supervisor explained that he had to deny the request and told Shroud he could not have paid funeral leave for death of a step child and that the earlier instance had been an error. The supervisor did arrange for Shroud, at his request, to use days from his scheduled vacation three months hence and Shroud took off Wednesday, Thursday, and Friday as vacation days. His step daughter was cremated on Wednesday, the day of the accident, and interment was made in a local cemetery the next morning.

When he returned to work the following Monday, Shroud talked with his Union steward, who was outraged and went directly to the General Manager. "Your insensitivity is unbelievable," the Steward said. "You granted him the leave earlier for the death of his son, as you should have, and he was certainly equally entitled to leave for the death of his daughter. I can't believe your callousness. This is utterly ridiculous." But the General Manager was adamant that the contract did not provide for paid leave for death of a step child and suggested that permitting Shroud to reschedule some of his vacation days was the proper response to the circumstances. The steward filed a grievance immediately.

PERTINENT EXCERPTS FROM THE AGREEMENT

ARTICLE I. Grievance Procedure

* * * * *

E. The decision of the arbitrator shall be final and binding upon both parties to the Agreement. However, it is agreed that the arbitrator shall be bound by this Agreement and shall have no authority whatsoever to subtract from, add to, or in any way modify its terms.

ARTICLE VII. Leaves

* * * * *

Section 3 - Funeral Leave

Regular employees shall be granted, in the event of the death of a father, mother, sister, brother, present husband, present wife, child, grandparents, present mother-in-law, present father-in-law or grandchildren, up to four (4) days absence from work with pay from the date of death to and including the day of burial. Permanent employees shall be granted one (1) day's absence from work with pay for attending the funeral of a present brother-in-law or present sister-in-law, present son-in-law, present daughter-in-law, current step mother, current step father, or present spouse's grandparent. If burial is over two hundred (200) miles from Pleasantville, employees will be permitted to be away from work with pay on the day following burial, provided he has not already used the maximum allowance for the death.

ADDITIONAL UNDISPUTED FACTS

1. Shroud lived with his wife for four years before they married. He was not previously married and has no birth children of his own. He never adopted his step children because he and his wife agreed they should continue to keep their birth names. Andrew Blake, his deceased step son, was 22 at the time of his suicide and an infant when Shroud began living with his wife. Rose Blake, his deceased step daughter, was 40 at the time of her death and had already left home when Shroud began living with his wife.

2. The parties have a long-standing relationship of more than 40 years and the agreement has included at least some provision for funeral leave from the beginning. Over the course of bargaining for the 18 contracts from then to the present, the funeral leave provisions have been the subject of nine bargained modifications. The contract's coverage of "child" is unchanged from the first agreement except that the maximum paid leave for death of a child has been changed twice, first from 2 to 3 days in one of the early agreements and then 14 years ago from 3 days to 4 days. The provisions regarding "current step mother" and "current step father" were bargained into the agreement 10 years ago. The most recent addition, negotiated in the immediately preceding contract, is "present spouse's grandparent." No modifications were proposed or discussed in bargaining for the current Agreement.

3. There is no record of any employee previously having requested or having been granted or denied funeral leave for the death of a step child and there has been no discussion of step children in any contract negotiations.

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University Professor of Industrial Relations
Indiana University of Pennsylvania

A WORD TO THE WISE

Ralph Howell has worked as a Maintenance Mechanic in the Engineering Department of Memorial Hospital for the past 18 years. He has served as president of the Hospital Worker's Union local twice for multi-term periods, most recently a six-year period that ended just over 18 months ago. Two weeks ago, the current local president informed the Hospital administration that Howell would be serving as appointed Shop Steward in the Engineering Department effective the beginning of next month. Howell proudly considers himself the champion of the hospital's employees and never tires reminding supervisors and managers, as well as co-workers, of his various successes, including especially the Union's victory in 17 of the 18 grievances taken to arbitration during his most recent tenure as president. By manner, Howell is gruff, brutally frank, loud, and abrasive.

Yesterday, Howell was on his morning rest period in the Hospital's "break room," together with most of the rest of the Engineering Department, leading a general gripe session about uniforms recently proposed by the Director of Engineering, George Sheik. Since they first learned of the idea, maintenance employees have told anyone who will listen that they don't like it. Currently they wear ordinary "work shirts" and "work pants" in solid colors with an identification badge on the shirt. Iva "Ivy" Vine, a bargaining unit employee who is Secretary to the Engineering Director, on several occasions at Sheik's direction has attempted to survey maintenance employees about their uniform preferences, but they generally have refused to cooperate. Howell doesn't like Vine and openly refers to her as "Poison." While Howell was in the midst of a diatribe against uniforms, Vine entered the break room, approached electrician Jim Smith, and in a normal voice asked him to go to the cafeteria after the break to look at a malfunctioning electrical outlet. Howell abruptly stopped talking and said, "I'm speaking, Ivy, please don't interrupt when I'm speaking."

"Excuse me, Ralph," Vine responded, "I just asked Jim to check on a malfunctioning outlet in the cafeteria after the break. But while you have the floor, how about asking everyone which of the proposed uniform designs they prefer." Howell got right in Vine's face and screamed, "Look, 'Poison,' we don't want no uniforms and I ain't takin' no survey. Here's a word to the wise: if you want to be a boss, I'll be happy to take your Union card and mail it back to the International for you. In the meantime, butt out of our rest period." Totally shaken, Vine asked, "Can you take my card? Do you want my card?" Howell chortled and, still within inches of her face, said, "I'll be happy to take it if you want to give it to me. One less boss would be a big improvement." Vine started to cry and ran from the room. Returning to his office from a meeting just before lunch, Sheik saw that Vine was red-eyed and sobbing at her desk. After some minutes, Vine was finally able to blurt out what had occurred in the break room. Sheik offered his support and said he'd talk that afternoon with Sue Bright, Employee Relations Director, about Howell.

During his lunch period, Howell was in the break room eating lunch and talking with two other Department employees. Sam High, a representative of AMCO, a maintenance supplies vendor, entered the break room and asked for Bill Post. Post was eating his lunch beyond where Howell and his two co-workers were talking. High called out to Post and began asking from across the room whether Post needed any more of certain supplies. Howell stood up and blurted out, "Excuse me, this is our lunch break. You don't have no business talking chemicals on our break. At least have the courtesy to walk over there to talk to Post and not shout through our conversation. But, as I said, your business can wait and you really ought to leave."

Worried that he may have caused a problem inadvertently, High mentioned the incident to Sheik before leaving the Hospital, apologizing if he had somehow violated procedures. Sheik told him that Howell was apparently having a "bad day" and not to give it any further thought, but advised that High probably should confine business contacts with employees to work periods. High said he understood, apologized again, and left. Sheik then went to see Employee Relations Director Bright to report both incidents with Howell and to consult about a course of action.

Bright was very concerned about Howell's attitude and demeanor and his effect on other employees. Checking his file, Bright recalled that Howell had received a written warning two years ago, while he was still Local president, for "inappropriate behavior." The incident involved a local Sheltered Workshop client who had been hired by the Hospital to do odd jobs. Since some of the jobs arguably involved bargaining unit work, the Hospital and the Union had negotiated a memorandum of understanding. One of the jobs Workshop clients were not to do was shovel snow. Howell observed the Workshop client sweeping snow from a walk, went outside and told him he wasn't allowed to do that work. The Maintenance Supervisor observed the confrontation from his office and told Howell that he had no business "jumping" the Workshop employee since that would only confuse him and destroy his confidence. Howell insisted that the Hospital had agreed not to have Workshop clients shovel snow. The Maintenance Supervisor agreed and gave his commitment that it wouldn't happen again, but also gave Howell a written warning for "inappropriate behavior" and instructed him that he was to follow normal channels in filing grievances rather than giving directions to others. Howell said his only concern was that the Hospital live up to its agreement and that he couldn't care less about the warning. He did not grieve.

"This has got to stop," Bright told Sheik. With Sheik present, Bright had Howell called to the office, recounted the two incidents that day as well as the incident two years ago, and asked if Howell had anything he wanted to say. Howell denied neither incident, saying only that the Hospital had agreed that break and meal times were private times. Bright then told Howell he would be suspended for two days, one for each incident, for "unreasonable and inappropriate behavior and lack of courtesy." Howell immediately grieved.

PERTINENT EXCERPTS FROM THE AGREEMENT

Article V - No Discrimination

No employee or applicant for employment shall be discriminated against because of membership or activities in the Union.

Article VIII - Hours of Work

* * * * *

Section B. The normal workday shall be eight (8) hours, including a one-half (1/2) hour-per-day meal period.

Section C. All employees shall be permitted two (2) paid rest periods during each regularly scheduled workday. These shall include a fifteen-(15) minute rest period during the first half of the shift and a fifteen-(15) minute rest period during the second half of the shift. The Hospital shall, wherever practical, endeavor to see that each employee is given a full period of rest and relaxation. However, rest periods may be interrupted by emergencies or other operational requirements. If an employee's meal period is interrupted by an emergency, that employee will be supplied another equivalent meal.

Article XV - Management Rights

The rights of the Hospital freely to manage its operations shall not be diminished, except as limited by this Agreement. . . . The Hospital shall have the right to establish reasonable rules and regulations, written and unwritten, and to discipline employees for just cause. . . .

OTHER PERTINENT PROVISIONS

MEMORIAL HOSPITAL DISCIPLINARY POLICY [Excerpts]

I. Policy: Each employee is held to a standard of appropriate and reasonable job performance and behavior, steady attendance, and consideration at all times of the best interests of the Hospital and its patients, visitors, physicians, vendors, and fellow employees. Disciplinary action for failure to meet these standards will be administered in a timely, impartial, reasonable and consistent manner.

III. Progressive Discipline

Discipline is administered in progressive steps, including one or more of the following: counseling; written warning; suspension without pay; and discharge. The severity of any disciplinary action is determined by the nature of the offense and the record of the employee. More serious offenses require more serious initial action; the most serious offenses require suspension and possibly termination. Subsequent offenses need not be the same or similar to previous offenses to warrant progressive discipline. The following are general examples, neither all-inclusive nor binding, provided solely as guides for consistent application:

A. First Step - Counseling.
Examples: . . . somewhat inappropriate dress or behavior.

B. Written Warning - used for first incident of a more serious problem or where prior counseling efforts are unsuccessful.
Examples: . . . lack of courtesy to patients, visitors, physicians, vendors, and fellow employees.

ADDITIONAL UNDISPUTED FACTS

1. The break room is an unfinished room in the basement with some lockers and storage chests located between the employee cafeteria/dining/vending area and the boiler room. The entire basement floor is non-public. Most Engineering Department employees take their rest periods in the break room and many eat their lunches or dinners there rather than in the dining area.

2. The Hospital and Union have a "maintenance of membership" clause in their agreement, providing that employees who are members of the local at the outset of the contract must maintain their membership during its term as a condition of continued employment. Local union officers have no authority, either under the contract or under union by-laws, to revoke the union membership of any bargaining unit member.

3. The current version of the Hospital's Disciplinary Policy has been in effect for five years. The Policy is in the employee handbook for which each employee must sign; is discussed in Hospital training; is posted on bulletin boards; and was communicated to the Union when adopted. The Union did not grieve the Hospital's adoption or implementation of the policy.

Donald S. McPherson © 1995
University Professor of Industrial Relations
Indiana University of Pennsylvania

A LIGHT AT THE END OF THE TUNNEL

R. James Beam has been an executive waiter/bar tender in the Food Service/Banquet Department of the luxury Four Seasons Hotel - Lighthouse on the riverfront near Station Square in Pittsburgh for 12 years. He is outgoing, friendly, has an infectious enthusiasm and sense of humor and is considered to be an excellent performer, well-liked by his supervisors and by groups and other private dining clients whom he has served at the Hotel. It is not unusual for particular groups or organizations to request his services at their banquets or affairs and the Hotel regularly assigns him to all of is major banquets.

He has had three cost-savings ideas accepted by the Hotel and been awarded a total of $1750 in prizes for the three suggestions. He has also been designated "Employee of the Month" five times; "Employee of the Year" once; and received the "Manager's Commendation Certificate for Outstanding Service and Performance" three times. Other than a few oral warnings for minor infractions over the years, Beam's disciplinary record was virtually clean except for attendance and tardiness problems. He is a "confirmed bachelor" and a happy-go-lucky, fun-loving free spirit with an active social life. From time to time, he has arrived late for an assignment or failed to arrive altogether, not infrequently on Mondays after "busy" weekends.

Eight years ago, pursuant to its contractual right to establish rules and regulations, the Hotel instituted a "no fault" Attendance Policy. The Policy applies to all employees, including management, and provides for point assessments for various types of absences, for a reduction of .5 assessed points for each 45 day period of perfect attendance, and for progressive discipline from verbal warning through discharge depending upon the level of assessed points. The Hotel provided an advance copy for the Union's review prior to implementation. The Union did not grieve implementation of the Policy, although it did make known its displeasure with the "no fault" aspects. All employees are given and must sign for copies of the Attendance Policy at the time of their employment and are provided and must sign for new copies at any time the Policy is revised and on January 1 every two years regardless of revisions.

Under the Policy, employees are assessed .5 points for all instances of tardy reports, early leaves, and failure to call in to report off prior to the beginning of an assigned work period. All individual days of absence are assessed at 1.0 points. Multi-day periods of absence for the same reason are assessed at 1.0 points for 1 or 2 days, 2.0 points for 3-5 days, and 1.0 points for each day over 5 days. The cause of tardiness, early leave, failure to report off or absence is immaterial. All absences, other than leaves (e.g. sick leave, jury leave, funeral leave, etc.) and vacations, except absences caused by required duties as a volunteer firefighter which are protected by state law, are assessed the appropriate number of points regardless of cause. When an employee reaches 10.0 assessed points, he or she is discharged.

Supervisors report attendance incidents to the Human Resources Clerk and also provide the employee involved with a form, returned to the HR Clerk, on which the employee indicates the duration and circumstances of the incident. The HR Clerk checks the duration information against the Supervisor's report and the time clock records and then inputs the appropriate assessment into a computerized system. Since the employee must provide information prior to the assessment being entered, the Hotel considers the employee to be responsible for knowing his or her current attendance record. The HR Clerk also oversees that portion of the system which reduces assessment totals by .5 points whenever an employee accumulates 45 days of perfect attendance. An employee's attendance records are open to that employee and may be consulted simply by making an appointment with the HR Clerk.

At the level of 7.0 assessed points, the formal progressive discipline system begins and an employee is officially notified by letter from Human Resources and in a counseling conference with the Supervisor of each instance of point assessment from 7.0 points onward. Employees also are told by the Supervisor in the conference and in the letter from HR the consequences of further point assessments. Employees receive no notifications of .5 point reductions for perfect attendance, but each time a point assessment takes them to 7.0 points or beyond, they receive the formal notifications and counseling.

Since the introduction of the no fault system eight years ago, Beam has been at 7.0 assessed points or beyond on two dozen occasions, but he had never been beyond 8.5 assessed points until about two years ago. It appeared from his records that whenever he reached the 8.5 point level, Beam would become purposeful about completing one or more 45 day periods of perfect attendance to reduce his assessed point total. From the end of the first full year of the Policy's operation to the present time, he has had a total of less than 5.0 accumulated points in only six individual months. Most of his assessments were for tardiness rather than for full days of absence and, in instances of absence, he rarely failed to call in to give notice.

Beam's attendance record over the past two years has deteriorated. His assessed point total has been 7.0 or more for all but two months of that period. He has had at least 8.0 points twice, receiving written warnings, and has been at the 9 point level twice, receiving final warnings in lieu of suspensions. He has been repeatedly counseled by his supervisor about what the supervisor labeled "Russian Roulette" with his job, but his response has been that he can take care of himself by working off the assessments through perfect attendance periods.

Beam most recently reached the 9.0 level and received a final warning on Monday, January 16, when he was absent and had no available sick or vacation days to use. Beam was two hours late reporting for work on February 24 and received an additional .5 point assessment, bringing his total to 9.5 points. He received a letter from Human Resources notifying him of his accumulated point total and warning that any further point assessments would result in his discharge.

Late in the afternoon of March 7, snow began to fall and continued throughout the night, accumulating to 10 inches or more by about 4 a.m. March 8 in the South Hills neighborhood where Beam lived. He was scheduled to report to work that day at 8 a.m. He arose at 6:00 a.m. to start shoveling his long drive way, where snow had drifted to over 2 1/2 feet. Normal drive time to the Hotel from his house was 30 minutes in rush hour, though the actual distance was about 7 miles. By 6:30, Beam concluded that he would not be able to get the drive cleared in time to get his car out and get to work. Skipping a shower, Beam threw on hat, coat, gloves and boots and set off for the nearest bus/trolley stop about three blocks from his house. When he arrived at the stop at nearly 6:45, he found a crowd of people who told him that neither the busses nor the mass transit system were operating on time and he could see that there were massive traffic problems even on main roads.

Beam went across the street to a convenience store and called the Hotel, leaving a message for his supervisor with the switchboard operator that he was having major transportation problems and would arrive as soon as he could. Observing again that no trolleys or busses had come by the stop and that traffic appeared to be jammed in all directions, Beam set off for the Hotel at about 6:50 on foot, running as best he could through the snow and slush. At about 8:30, he reached the entrance to the Liberty Tunnels. Knowing he couldn't go through on foot, he jumped on the back of a garbage truck entering the tunnels and rode through on the back, alighting at the other end. He then descended to Carson Street on foot and ran the remaining mile to the Hotel complex on the riverfront near Station Square, arriving at 9:05, when he punched in and reported immediately, breathless, freezing and totally disheveled, to his supervisor, the Banquet Manager. He said he knew he already had 9.5 points, but that he had made every effort to get to work on time and was prevented by "an Act of God."

The Banquet Manager told Beam to go to his locker, take a shower, get some clean clothes on and report to the office of the Director of Human Resources at 10:00 with his Union steward. He did so and, after reviewing Beam's attendance record and hearing his explanation, the HR Director complimented him on his extraordinary effort to get to work. But the Director informed Beam that with a .5 point assessment for tardiness, he had reached the 10.0 point level nevertheless and was discharged effective immediately. Beam and the Steward wrote up a grievance as soon as the meeting concluded.

PERTINENT EXCERPTS FROM THE AGREEMENT

ARTICLE V. MANAGEMENT RIGHTS

The management of the hotel and the direction of the working forces, including but not limited to, the rights to plan, direct and control operations; hire; determine the number of employees and hours of work; study and introduce new or improved production methods or facilities; establish and maintain rules and regulations; and discipline employees for violation of such rules, are prerogatives of Management, subject to and where not in conflict with this Agreement. Copies of all rules and regulations shall be given to the Union for review no less than ten (10) days prior to implementation. Such rules and discipline for violating such rules, are subject to the grievance and arbitration procedure.

ARTICLE IX. GRIEVANCE PROCEDURE

A. "Grievance" -- Should differences arise between the Employer and its employees or the Union as to the interpretation or application of the provisions of this Agreement covering discipline, wages, hours or terms and conditions of employment, there shall be no slow down or stoppage of work and an earnest effort shall be made to settle such differences through the grievance and arbitration procedure provided herein.

* * * * *

OTHER PERTINENT PROVISIONS

Four Seasons - Lighthouse Hotel Attendance Policy (Excerpts)

So that all employees understand the Hotel's attendance requirements and so that no employee inadvertently fails to provide the level of regular attendance that the Hotel requires, the Hotel has established this Policy, which is designed to help insure regular attendance and to guide the discipline and discharge of those employees whose value to the Hotel has been diminished by their poor attendance.

Employees will be disciplined and ultimately terminated when their attendance becomes unreliable or when the total number of work days missed, regardless of the reason, is excessive as defined by operation of the Policy.

This "no fault" attendance control program is based on a point system under which employees will be discharged for accumulating ten (10) or more points. This system was developed to give employees a clear understanding of the consequences of absence, failure to report off, tardiness, and early quit.

* * * * *

I. Attendance Incidents

* * * * *

F. The following progressive discipline will be triggered by the accumulation of points:

7 points . . . . . Verbal Warning
8 points . . . . . Written Warning and Counseling
9 points . . . . . Final Written Warning in Lieu of Suspension and Counseling
10 points . . . . . Discharge

ADDITIONAL UNDISPUTED FACTS

1. On March 8, the day of Beam's discharge, 88% of the Hotel's employees reported as scheduled for assigned work. On a typical day, 7% of the Hotel's employees are absent, including absences for sickness, leaves, vacations, etc. All employees who were tardy or absent per the Attendance Policy were assessed the appropriate points on March 8. The Hotel employees approximately 300 persons.

2. The Hotel has consistently enforced the Attendance Policy. There have been three general amnesties declared retroactively by the Hotel in the last two years. Once two years ago and once last year, the region was hit with major snow storms, including the "Blizzard of the Century" last year. In both cases, less than 60% of the Hotel's employees reported for work. There was also a general amnesty during the three days of a city-wide mass transit strike two summers ago. All employees (29 in the past two years) who have accumulated 10 points since the inception of the Policy have been discharged upon assessment of the 10th point.

3. Beam has not previously grieved any point assessments. Among the attendance points assessed to him are four occasions in the past two years, other than those resulting in general amnesties, when he reported that he was either tardy for work or absent because of snow. On five other occasions he reported that he was tardy or absent because of car problems and was assessed the appropriate points on each occasion.

4. Last Fall during bargaining for a successor Agreement, the Union proposed three changes in the Attendance Policy to the Hotel: 1) that the perfect attendance period for earning .5 point reductions be decreased from 60 days, which it had been since the Policy was first instituted, to 45 days; 2) that the .25 point assessment for failure to punch time card properly that had been in the original policy be eliminated; 3) that both changes be implemented retroactively for all employee records. The Hotel agreed to negotiate about the three proposals and they were ultimately adopted as proposed. They became a part of the Policy effective on the same day as the new Agreement, January 1.

5. Beam immediately applied for unemployment compensation, which the Employer contested. While his grievance was still being processed, the Unemployment Referee found him eligible for compensation. The Pennsylvania Unemployment Compensation Law provides that an employee "shall be ineligible for compensation for any week . . . in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." The Referee found that Beam was not guilty of "willful misconduct" under the statute in the circumstances that led to his discharge.

Donald S. McPherson © 1995
University Professor of Industrial Relations
Indiana University of Pennsylvania

A SWITCH IN TIME SAVES NINE ?

American Metropolitan Power (AMP) is an operating electrical power generating company that maintains a Central Machine Shop in Roosevelt, New York, for the purpose of servicing its generating and transmitting equipment. Twelve welders work in the Central Machine Shop. Among other CMS employees of AMP, the welders were notified three weeks ago that the Company planned an upcoming round of specialized training related to scheduled repair work at the Charles Evans Hughes Nuclear Power Plant. Employees were required to be trained in various standard operating procedures in the nuclear industry prior to carrying out the repairs scheduled at the Roosevelt station.

The three senior welders are assigned (per seniority-based bidding procedure) to fixed day shifts and work a 7:30 am - 4:00 pm schedule with a one-half hour unpaid lunch. Nine of the welders have their shift assignments rotated and are referred to as "rotators." The rotators normally work scheduled rotating shift assignments of one week on day, one week on afternoon and one week on night. Rotators work a scheduled shift assignment of 8 am - 4 pm (day); 4 pm - 12 midnight (afternoon); and 12 midnight - 8 am (night), which includes a one-half hour paid lunch.

George Sutherland and Ben Cardozo were rotators who originally were scheduled to work last week on the night shift, 12 midnight - 8 am. The three-day nuclear procedures training to which they were assigned, however, was scheduled last week also, from 7:30 a.m. to 4 pm, Tuesday, Wednesday and Thursday at AMP's James C. McReynolds Training Center. Two of the regular fixed day shift welders, Harlan Stone and Pierce Butler, also were assigned to the training class on Tuesday, Wednesday and Thursday at McReynolds Center. They simply reported for their regular 7:30 am - 4 pm shifts and went to the training center on the three class days.

In order to facilitate the participation of Sutherland and Cardozo in the class, CMS Superintendent Owen Roberts changed their originally posted night shift schedule, with proper and timely notice, to a 7:30 am - 4 pm fixed dayshift schedule for the entire week. On the two days they would not attend training, they were simply assigned as day shift welders at CMS. Two welders scheduled on rotating day shift last week, Willis Van Devanter and Louis Brandeis, were also assigned to the training class. Since their regular, scheduled rotating day shift (8 am - 4 pm) already approximated the training schedule, Roberts did not change the schedules of Van Devanter and Brandeis but, rather, called them each in one-half hour early (7:30 a.m.) on the three training days and paid them each one and one-half hours (30 minutes/day x 3 days) at time and one-half in addition to their regular hours for the week since they worked outside of their assigned schedules.

When their schedule change notices were received, Sutherland and Cardozo protested that the "new deal" wasn't fair. They requested to be put on the rotating day shift schedule rather than the fixed day shift schedule but Roberts denied their request. Each day, Sutherland and Cardozo requested permission to leave at 3:30 pm but their requests were also denied by the Training Supervisor, Millie Watt, in consultation with Roberts. Sutherland and Cardozo therefore worked the week per the changed schedule as fixed day shift welders. They were not paid any overtime since, Roberts explained, they were working the normal hours of the fixed day shift to which their assignments properly had been changed. At the close of their shift on last Friday, Sutherland and Cardozo filed a grievance seeking payment of one-half hour per day at time and one-half for each of the five days last week.

PERTINENT EXCERPTS FROM THE AGREEMENT

ARTICLE X. Work and Wage Practices

A. The workweek shall consist of seven consecutive days beginning at midnight Friday and ending at midnight the following Friday. The workday shall consist of a 24 hour period beginning and ending at midnight.

B. The normal workday and normal workweek shall consist of eight hours per day and five days per week, exclusive of any unpaid lunch period that may be provided in some jobs. The normal workweek of 40 hours of scheduled work will be compensated at regular straight-time rates.

C. No provision of this article shall be construed as a guarantee of work hours or pay.

D. The work schedule of each employee, including starting and quitting times and off days, will be posted at least three days prior to the beginning of each workweek provided, however, that a new posting need not be made in any department where the upcoming workweek schedule remains unchanged from the present, already-posted workweek schedule.

1. "Schedule Change" shall mean a change in scheduled workdays or workweek. "Shift Change" shall mean a change from one shift to another within a workday.

2. Assignment of Overtime shall not constitute a schedule change or shift change.

3. Employees who work on a shift basis will receive a shift differential of 25 cents ($0.25) more per hour for the afternoon shift and 45 cents ($0.45) more per hour for the night shift over the applicable straight-time rates. Shift differential does not apply to overtime beyond the hours of the day shift for employees assigned to that shift. An employee regularly assigned to the day shift who is temporarily assigned to the afternoon or night shift will be paid the differential applicable to the shift temporarily assigned. An employee regularly assigned to the day shift who is held over or called out to replace an employee for the entire afternoon or night shifts will be paid the applicable shift differential for the replacement shift plus any earned overtime.

4. Where the majority of scheduled work hours are between 7 am and 3 pm, an employee will be considered as assigned to the day shift, for which there is no shift differential. Where the majority of scheduled work hours are between 3 pm and 11 pm or 11 pm and 7 am, an employee will be considered as assigned to the afternoon or night shift, respectively, and will be paid the shift differential applicable to such shift.

ARTICLE XI. Overtime

A. Time and one-half will be paid for all work outside of scheduled hours and for all work over 40 hours in a workweek.

B. Unless notified of a change in shift 24 hours before commencement of work on the new shift, an employee whose shift is changed will be paid time and one-half for the first changed shift worked.

C. If a new shift commences less than 14 hours after the end of a previously scheduled and worked shift, an employee will be paid time and one half for all work on the first new shift worked.

D. If an employee has been required to change shifts and has been paid premium pay as a result, the provisions of B and C above will not apply to a later change necessary to return such employee to his or her regular work schedule.

ARTICLE XIII. Grievance Procedure

* * * * *

G. Neither regular nor expedited arbitrators shall have any authority or jurisdiction to add to, subtract from, or in any way modify the terms of this Agreement.

ARTICLE XX. Management

All rights of management, including but not limited to the rights to manage the facilities and direct the working forces, reside in and are reserved to the Company unless expressly limited by provision(s) of this Agreement.

ADDITIONAL UNDISPUTED FACTS

1. Sutherland and Cardozo make $12 per hour.

2. The parties have in place an expedited grievance procedure with a panel of expedited arbitrators. Grievances which the parties agree to treat through the expedited procedure go directly to the third step for filing and, if not resolved, are heard within 15 days. Expedited arbitrators are required to give an award and brief opinion within 48 hours of the close of the expedited hearing.

3. The parties agreed to handle the Sutherland-Cardozo grievance through the expedited procedure.

ABOUT THE AUTHOR

Donald Scott McPherson holds the Distinguished Teaching Chair of University Professor at Indiana University of Pennsylvania, where he is Professor of Industrial and Labor Relations and has been a faculty member since 1969. He served as chief human resources administrator of the IUP residence hall system as Director of Residence Life before being named Chairperson of the newly established Graduate Department of Industrial and Labor Relations in 1977. He developed a full semester graduate course in Contract Administration in 1977 and has taught the course several times each academic year since then.

Professor McPherson is a practicing labor and employment arbitrator, mediator, and factfinder, listed on permanent panels in the steel, coal and electrical industries; municipal police, Federal agencies, and the rosters of the American Arbitration Association, Federal Mediation and Conciliation Service, National Mediation Board, Pennsylvania Bureau of Mediation, Pennsylvania Labor Relations Board and the Mediation and Research Education Project, Inc. He holds a Ph.D. in History from the University of Pittsburgh and his teaching fields include conflict resolution; contract administration; employment discrimination; creative problem solving; employee rights under law; and labor history. He is the author of a book, *Resolving Grievances* (Reston/Prentice Hall, 1983) and numerous articles and collections of teaching materials, including *Negotiating Grievance Settlements: Cases and Materials* and *Cases in Employment Discrimination.*

An experienced trainer, Professor McPherson has conducted workshops and seminars for industry, unions, utilities, health care facilities, educational institutions and associations, and state and local government in areas such as conflict resolution, interest-based negotiation, communication skills, supervision, steward development, and equal employment opportunity. Prior to beginning his neutral practice in 1981, he served as president of his faculty union local.

Professor McPherson received the IUP Alumni Association Award for Professional Achievement and the Commonwealth of Pennsylvania Distinguished Faculty Award for Exceptional Academic Service in 1983. In 1988, he served as Instructor for a course in U.S. - U.K. Comparative Industrial Relations at Ruskin College, Oxford University, England. He was named University Professor at IUP in 1993.

He is active in the National Academy of Arbitrators, American Arbitration Association, Society of Professionals in Dispute Resolution, International Association for Conflict Management, Industrial Relations Research Association, International Industrial Relations Association, Society of Federal Labor Relations Professionals, and the Pennsylvania Council of Mediators.

Negotiating Grievance Settlements was first printed in 1985 and has been expanded with new cases and materials each academic year since then. The early development of cases was substantially underwritten by a Creative Teaching Grant from IUP in the summer of 1989.

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